EXHIBIT I

Memorandum on the International Law Questions Involved in United States v. States of Louisiana, et al.

By Louis B. Sohn*

1. The Submerged Lands Act transferred to States certain property rights with respect to lands beneath navigable waters and the natural resources within such lands and waters "within the boundaries of the respective States." The term "boundaries" was defined as including the boundaries of a State in the Gulf of Mexico "as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress," but in no event extending more than three leagues into the Gulf of Mexico.

The statute proceeds clearly on the assumption that under both the law of the United States and international law, the property rights in the resources of the continental shelf are vested in the United States. The only question left open in the statute is where the dividing line should be drawn between federal and state property in cases in which the historic boundaries of the Gulf States extended beyond three geographical miles. This question

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seems to be principally a question of fact, i. e., where were the actual boundaries of these States at the crucial dates chosen by Congress. According to Section 4 of the Submerged Lands Act, a State's boundary could have been established by several alternative methods: "by its constitutions or laws prior to or at the time such State became a member of the Union," or by Congressional approval. Whether State boundaries in the Gulf of Mexico have been established by any of these acts, is again a question of fact, or in some cases a question of interpretation of the relevant document.

2. All these questions are exclusively questions of domestic law and no issues of international law seem to be involved here. The contention of the United States is, however, that the relevant State boundaries "have never had any validity under international law" (Brief for the United States, p. 104). This contention is denied by the defendant States, which claim that their boundaries did not at the relevant dates violate any rules of international law on maritime boundaries.

If, contrary to the view presented in section 1, above, the Supreme Court should wish to discuss the question of international law raised by the United States—i. e., whether State acts extending the boundaries of the Gulf States three marine leagues into the Gulf of Mexico were invalid under international law as it existed at the crucial period, i. e., between 1812 and 1868—the following considerations should be taken into account.

3. It is a recognized principle of international intertemporal law that "a juridical fact must be ap-

preciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises." [Judge Huber in the *Island of Palmas Case* between the United States and the Netherlands, 1928; 22 *American Journal of International Law 883* (1928); 2 United Nations, *Reports of International Arbitral Awards 845* (1949).] In another territorial dispute it has been said that "The right of nations to countries discovered in the sixteenth century is to be determined by the law of nations as understood *at that time*, and not by the improved and more enlightened opinion of three centuries later." [Secretary of State Upshur to Mr. Everett, American Minister to Great Britian, October 9, 1843; 1 Moore, *A Digest of International Law* 259 (1906.)]

Similarly, in the present case, the legal validity of the acts of the Gulf States by which their boundaries were extended into the Gulf of Mexico would have to be evaluated in the light of the rules of international law which existed in the first half of the nineteenth century. The problem should be approached in the same way and by the same method as the Supreme Court or an international court would have approached them if it had to decide the issue in the very year in which the crucial events transpired, i. e., 1812, 1817, 1819, 1836, 1845 or 1868, as the case may be.

Consequently, in trying to decide upon the validity or not of each State act, one has to determine first what was the rule of international law applicable to the act at the time that act was enacted or approved. Later authorities can be used only when

it is clear that there has been no change either in the rule or its scope, or where a later authority has dealt with the matter from the point of view not of its own time but in a historical manner, in the light of the rules of the period in which the relevant facts occurred. Of course, it may be difficult to pinpoint the existence of a particular rule at a certain date and for that reason it is generally permissible to consider such contemporary sources of law as are not too far removed in time and spirit from the crucial date. On the other hand, there may be cases in which certain principles have persisted for such a long time without any change that it is not necessary to prove their existence at a particular time. In such a case the burden of proof would be on the party trying to persuade the Court that at a particular point in time there was a temporary departure from the general princple.

4. When these principles are applied to the problem of the rights of the Gulf States in the adjacent waters of the Gulf of Mexico in the first seventy years of the nineteenth century, the following questions would seem to emerge:

(a) What were at that time the basic rules of international law with respect to the extension of the jurisdiction of a nation over the sea adjacent to its territory?

(b) Did the same rules apply to all aspects of jurisdiction over the neighboring sea or were there different rules for different purposes?

(c) Were these rules of universal applicability or did they allow regional departures either from

the main principles or from some of their basic features?

(d) Were any departures from these rules permitted on the basis of "historic" rights?

(e) To what extent was a State permitted to acquire special rights with respect to the subsoil of the sea and its resources?

5. There can be no doubt that, by 1812, the rule that a State had the right to extend its jurisdiction over the areas of the sea adjacent to its territory was firmly established. That rule can be traced at least to Bartolus de Sassoferrato and his pupil Baldus de Ubaldis, and it survived without any difficulty the battle royal for the freedom of the seas. Grotius and his followers and Selden and his adherents disagreed on the dominion over the vast oceans, the high seas, but there was no disagreement between them about the right of a State to extend its jurisdiction over bays and straits embraced by its territory and over a limited area of the sea adjoining that territory. The following summary of the situation at the beginning of the nineteenth century may be considered as representing the general consensus on the subject:

> " . . . Originally it was taken for granted that the sea could be appropriated. It was effectively appropriated in some instances; and in others extravagant pretensions were put forward, supported by wholly insufficient acts. Gradually, as appropriation of the larger areas was found to be generally unreal, to be burdensome to strangers, and to be unattended by

compensating advantages, a disinclination to submit to it arose, and partly through insensible abandonment, partly through opposition to the exercise of inadequate or intermittent control, the larger claims disappeared, and those only continued at last to be recognised which affected waters the possession of which was supposed to be necessary to the safety of a state, or which were thought to be within its power to command. Upon this modification of practice it may be doubted whether theories affirming that the sea is insusceptible of occupation had any serious influence. They no doubt accelerated the restrictive movement which took place, but outside the realm of books they never succeeded in establishing predominant authority. The true key to the development of the law is to be sought in the principle that maritime occupation must be effective in order to be valid. This principle may be taken as the formal expression of the results of the experience of the last two hundred and fifty years, and when coupled with the rule that the proprietor of territorial waters may not deny their navigation to foreigners, its reconciles the interests of a particular state with those of the body of states. As a matter of history, in proportion as the due limits of these conflicting interests were ascertained the practical rule which represented the principal became insensibly consolidated, until at the beginning of the present century it may fairly be said that though its application was still rough it was definitively settled as law."

" . . . In claiming its marginal seas as property a state is able to satisfy the condition of

valid appropriaton, because a narrow belt of water along a coast can be effectively commanded from the coast itself either by guns or by means of a coast-guard. In fact also such a belt is always appropriated, because states reserve to their own subjects the enjoyment of its fisheries, or, in other words, take from it the natural products which it is capable of yielding. It may be added that, unless the right to exercise control were admitted, no sufficient security would exist for the lives and property of the subjects of the state upon land; they would be exposed without recognised means of redress to the intended or accidental effects of acts of violence directed against themselves or others by persons of whose nationality, in the absence of a right to pursue and capture, it would often be impossible to get proof, and whose state consequently could not be made responsible for their deeds. Accordingly, on the assumption that any part of the sea is susceptible of appropriation, no serious question can arise as to the existence of property in marginal waters." Hall, International Law 124-26 (1880).

6. While there existed this general agreement on the basic principle, this agreement did not extend to two important aspects of its application: the extent of the adjacent area of the sea which could be made subject to the jurisdiction of the neighboring State and the amount of dominion and jurisdiction which could be exercised over that area. As Chancellor Kent pointed out, "The extent of jurisdiction over the adjoining seas, is often a question of difficulty, and of dubious right." [1 Kent, *Commentaries on American Law* 25 (3rd ed., 1836).] He added

that "All that can reasonably be asserted is, that the dominion of the sovereign of the shore over the contiguous sea, extends as far as is requisite for his safety, and for some lawful end." [*Ibid.*, at 28.] The rule here, as in many other areas of international law was the rule of reasonableness. Chief Justice Marshall put it down very clearly in a parallel case: if the means used by a State "are such as are reasonable and necessary to secure their laws from violation, they will be submitted to." [*Church v. Hubbart*, 2 Cranch 187, at 235 (1804).] In a similar way, Professor Lauterpacht stated recently that the doctrine of the freedom of the seas "con be safeguarded only if it is acted upon in accordance with its true purpose and the ever valid test of reasonableness." [H. Lauterpacht, "Sovereignty over Submarine Areas," 27 *British Year Book if International Law* 376, at 407 (1950).]

What is reasonable depends on the circumstances of each case and on the spirit of the times. From the days of Bartolus to Alberico Gentili, it seemed quite reasonable to extend national jurisdiction one hundred miles into the sea. [Gentili, *Hispanicae Advocationis Libri Duo* 32-33 (ed. of 1661, reprinted in Classics of International Law, 1921).] The famous bull of Pope Alexander VI dividing the New World between Spain and Portugal in 1493, drew the boundary line 100 leagues from the Azores and Cape Verde Islands, and the Treaty of Utrecht of 1713 dealt with fisheries up to thirty leagues from the coasts of Nova Scotia. [1 Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies* 71, at 75, 77 (1917); 3 *idem*

192, at 212 (1934).] But when the limit of 100 miles was enacted by Russia in 1821, it led immediately to many protests. [See, e. g., the American protests in 4 *American State Papers: Foreign Relations* 861, 863 (ed. of 1834).] On the other hand, one may note the statement in the Declaration of Panama of October 3, 1939, that the American Republics must "as a measure of self-protection insist that the waters to a reasonable distance from their coasts shall remain free from the commission of hostile acts," and that they are entitled to establish a 300-mile zone for that purpose. [*U. S. Foreign Relations*, 1939, Vol. 5, pp. 35-37.]

7. During the eighteenth and nineteenth centuries one can observe continuous attempts by various nations, and their publicists, to devise methods for shrinking the sea area subject to the jurisdiction of the adjacent States. To the question what limit is reasonable, various answers were given, each designed to diminish the control of the sea-bordering States over the neighboring waters. It was admitted quite quickly that claims to sea territory stretching from the coast 100, 60 or 30 miles, or to a distance which may be traveled by a ship in two days or even one day, were not reasonable. But once the struggle was narrowed down to distances below twenty miles, several "reasonable" rules made their appearance, and there seemed to be no valid reason to choose one of them rather than another.

For instance, in order to determine which bays were to be considered to be within the nation's jurisdiction, the rule was developed of the line of vision—if a person on a boat in the middle of the bay could

see the land on both sides, the bay was within a nation's jurisdiction. It seemed reasonable to apply that rule also to the neighboring sea—if a person could see the land from the mast of the boat, he could no longer claim that he did not know that he was near the coast. It was felt also that when foreign vessels either fish or wage war in the sight of land, the local population might justly consider itself or its economic interests in danger, and the coastal State should be entitled, therefore, to prohibit such activities. [For a modern reference to this reasoning, see the statement by Prime Minister Churchill of December 25, 1939, in which he informed President Roosevelt of instructions given the British ships to arrest or attack enemy supply vessels only "out of sight of United States shores." *U. S. Foreign Relations*, 1939, vol. 5, p. 121.] In some areas, e. g. Scotland, and in some treaties the rule of jurisdiction over the area within the sight of the coast did, therefore, develop. Though state practice did not measure this distance in miles, in view of the differences in the height of the masts and in the vision of various persons, some authors made an attempt to ascribe a specific distance to the line-of-vision rule, but their estimates of the average differed from twelve to twenty miles. The distance of "upwards of twenty miles" was mentioned, for instance, in this connection by Jefferson in his notes to foreign ambassadors of November 8, 1793. [6 *The Writings of Thomas Jefferson* 440, 442 (ed. of 1895).]

Another rule, which was also based on the principle that the ship master should have a means of knowledge that he was approaching a foreign coast,

relied on the measurement of the depth of the water —if a ship's lead could reach the bottom, this was a warning that foreign land was near and that the ship was within the neighboring nation's jurisdiction. Thus Valin, in his famous commentary on the French maritime regulations, after dismissing other rules, stated that "it would have been better perhaps to reckon the domain over the adjacent sea by the sounding-lead, and to assign its limits exactly at that point where the lead ceased to fetch bottom." [2 Valin, *Nouveau Commentaire sur l'Ordonnance de la Marine* 638 (1760).] It may be noted that this commentary was well-known to American statesmen and was relied on by them in the 1793 dispute with France. [See e. g., Randolph's opinion of May 14, 1793, 1 *Op. Att. Gen.* 15, at 17 (ed. 1841); Hamilton's statement of December 6, 1796, reprinted in 6 *The Works of Alexander Hamilton* 215, at 218-20 (ed. of 1904).] In the above cited correspondence with foreign ambassadors, Jefferson referred indirectly to the depth rule, when he pointed out that the United States might in the future claim a limit broader than three geographical miles in view of the special character of the American coast, "remarkable in considerable parts of it for admitting no vessels of size to pass near the shore." [6 *The Writings of Thomas Jefferson*, 440, 442 (ed. of 1895).] While this rule was relevant in 1793, it became even more important after the admission of the Gulf States into the Union, as the coastal waters of the Gulf were much more shallow than the waters near the Atlantic coast.

Closely connected with this principle was another one based on the idea that a State had the right and the duty to protect coastal navigation, i. e., vessels plying between various ports on the coast, as distinguished from intercontinental navigation across the high seas. In many countries cabotage between domestic ports was reserved exclusively to domestic vessels, and there seemed to be sufficient reason to grant them special protection. This might have been the meaning of Jefferson's statement in 1793 that the United States was entitled to "as broad a margin of protected navigation, as any nation whatever." [6 *The Writings of Thomas Jefferson* 440, 442 (ed. of 1895).] The special conditions in the Gulf of Mexico, where the coastal vessels had to stay a little further from the coast because of the shallowness of water, would have justified extending the margin of protection for the coastal shipping to at least three leagues. It may be noted that the main reason given by the United States for extending a neutrality zone to 300 miles by the Declaration of Panama of 1939, was to prevent belligerent activities "within waters adjacent to the American continent which embrace normal inter-American maritime communications," and to allow the American Republics "to pursue their normal peacetime trade and commerce in waters adjacent to their shores." [*U. S. Foreign Relations*, 1939, vol. V, at 87, 88.] By analogy, one could say that a hundred years earlier, the United States was entitled to claim at least three leagues for the purpose of protecting normal peaceful trade and commerce between its harbours in the Gulf.

A fourth rule, applicable principally to the limited problems of naval warfare, was based on the range of the cannon. This principle could be justified in several ways. In the first place, the ships of one belligerent were entitled to the protection of a friendly, neutral State against attacks by the other belligerent near the shores of the neutral State. Such protection could be effectively given either by the naval vessels of the neutral State stationed near the coast or by the guns of coastal fortresses. The first method was mentioned by the early writers, but it was later abandoned as jurisdiction based on the presence of a fleet was considered purely temporary and it would have to shift constantly with the movement of the ships. The second method, based on the range of the guns of a fortress, became immediately popular as a limit for belligerent activities. Originally, this protection rule was applied only in an area surrounding the actual location of coastal fortresses, and the width of the area depended on the actual range of the guns of a particular battery. Later the application of the rule was extended to coasts where there were no batteries and instead of the actual range of a gun, an average or maximum range was substituted. This process was speeded up by the fact that in the meantime another justification was developed for the rule, namely that the purpose of the rule was also to prevent the possibility of damage on the shore being caused by an exchange of shots among belligerent vessels. From that point of view, the range of guns on the shore was irrelevant; what mattered most was the range of the cannon on board belligerent ships. Both these reasons justified the application of a prohibition of belligerent activities

to an area along the coast of a State to be measured by the range of the cannon, usually the maximum rather than the actual or average range, and this principle was applied in the second half of the eighteenth century and first half of the nineteenth century in many national regulations, bilateral treaties and diplomatic exchanges. [For a history of this rule, see Walker, "Territorial Waters: The Cannon Shot Rule," 22 *British Year Book of International Law* 210-31 (1945).]

It is not surprising, therefore, that when the United States Government was looking around for a principle of international law on which it could base its opposition to French belligerent activites off the American coast, it resorted to the cannon shot rule, i. e., "the utmost range of a cannon ball, usually stated at one sea-league." But in his letters to foreign envoys Jefferson made it clear that this was a minimum rule of a provisional character, and that this limit was to be applied only to the prohibition of hostilities in a zone of protected navigation. [6 *The Writings of Thomas Jefferson* 440-42 (ed. of 1895).] The Neutrality Act of 1794 was similarly limited to "cases of captures" by belligerents. [1 Stat. 381, at 384.] There is no intimation, either at that time or for a long time thereafter that the United States considered the cannon-shot or three-mile rule as reasonable for all purposes, and in particular as the basis for a maritime boundary delimiting the utmost reach of American jurisdiction.

Logically, if the area between the shore and the three-mile limit of the cannon shot were considered as part of the territory of the United States for all

purposes, then the prohibition of belligerent activities should have extended three miles further in order to ensure that there would be no interference with peacetime activities in the first three-mile zone. To the extent that the purpose of the rule was to safeguard the lives and property of the inhabitants of the country engaged in peaceful pursuit at home, the rule would seem to require that navigation and fishing in the three-mile zone be equally safeguarded from intentional or accidental shots of belligerents. Consequently, such activities should have been removed at least three miles from the original three-mile zone, and belligerent activities should have been prohibited within a six-mile zone rather than a three-mile zone only. This logical step was taken by Spain and several other nations which adopted the six-mile or double cannon-shot rule. From the point of view of reasonableness, there would seem to be no objection to such a rule, and the objections made by the United States against that rule could be justified only where that Spanish rule interferred with historical rights of navigation in international straits between the Atlantic and the Gulf of Mexico. The American protest of July 7, 1855 was based clearly on the ground of interference with "thoroughfares of commerce" and was thus within the exception stated by Chief Justice Marshall in *Church v. Hubbart*, where it was recognized that in a channel, where a great amount of commerce passes, seizures "must necessarily be restricted to very narrow limits." [11 Manning, *Diplomatic Correspondence of the United States: Inter-American Affairs, 1831-1860*, 214, at 217; 2 Cranch 187, at 234-36.] It

may also be noted that Secretary of State Seward wrote in 1863 that "The United States, under ordinary circumstances, could not, so far as I am able to judge, have any special interest in denying to Spain the claim she makes of a maritime jurisdiction exceeding three miles around the island of Cuba, or elsewhere." [*Papers Relating to Foreign Affairs*, 1863, Part 2, p. 905.]

In any case, it is important to remember that the cannon-shot rule and its temporary equivalent the three-mile rule were designed originally for one purpose only, i. e., for keeping belligerents away from the coastal waters, and where applied only in areas closely connected with belligerent activities. For other purposes other rules were devised.

8. In fact, during both the crucial period of 1812-68 and during the period immediately preceding it, there is ample evidence that the test of reasonableness of a distance depended to a large extent on the purpose for which a particular limit was established. During these periods jurisdiction was extended into the sea for various purposes: protection of navigation against piracy, prevention of hostilities between foreign ships near the shore, assuring proper respect to the national flag, protection of the inhabitants of the coast, national security, enforcement of customs laws, criminal jurisdiction, regulation of fishing and exclusion of foreign fishermen. It was generally recognized that there may be good reasons for extending the jurisdiction of a State further into the sea for some purposes and for being satisfied with a smaller distance for other purposes. [See, e. g., A. Geouffrede La Pradelle, "Le droit de l'Etat

sur la mer territoriale," 5 *Revue générale de droit international public* 264-84, 309-47, at 338-47 (1898); 3 Gidel, *Le droit international public de la mer* 153-92 (1934).]

The practice of States, judicial decisions and writers on international law during this period seldom deal with the question in terms of a definite boundary for all purposes. Instead there are constant references to the fact that the dominion and jurisdiction of a State over the coastal sea are different from those over the land, in particular because of the right of foreign vessels to innocent passage through the territorial sea. [See, e. g., 1 Ortolan, *Règles internationales et diplomatie de la mer* 168-72 (3rd ed., 1856).] During such a passage foreign vessels are subject to the jurisdiction of the adjoining State for various purposes; the closer they get to land, the more are they subject to the jurisdiction of the coastal State; finally, when a vessel enters inland waters, local jurisdiction over it becomes almost complete. While it seems proper to adopt various laws and regulations with respect to foreign vessels navigating close to the coast, it was generally accepted that only in important matters should such laws and regulations apply to foreign vessels navigating in more distant waters. Even with respect to criminal offenses distinction was made between crimes completed on board ship and crimes the effects of which were felt aboard another ship or in the sea. [See, e. g., *R. v. Keyn*, 2 Ex. D. 63, at 81-83, 191-94 (1876).]

It is not surprising, therefore, that the Congress of the United States almost simultaneously adopted two different zones for maritime captures and cus-

toms control. While the Neutrality Act of 1794 conferred jurisdiction upon the district courts to take cognizance of "captures made within the waters of the United States or within a marine league of the coast or shores thereof", the Customs Acts of August 4, 1790, and March 2, 1799, imposed various duties on foreign vessels arriving "within four leagues of the coast" of the United States and authorized customs officers to examine and search such vessels. [1 Stat. 145, at 164, 175, and 627, at 648, 700.] Previously, during the negotiations with Great Britain over fisheries in the North Atlantic, the United States proposed a limit of three leagues as the most proper distance for exclusive fishing rights. [See, e.g., Report of a Committee of Congress of January 8, 1782, 23 *Journals of the Continental Congress*, 1774-1789, 472, at 477-78.] Chancellor Kent thought it proper to apply the four-league rule to other areas and insisted that "no belligerent right should be exercised within 'the chambers formed by headlands, or any where at sea within the distance of four leagues, or from a right line from one headland to another.' " [1 Kent, *Commentaries on American Law* 30 (1826).] There is no reason to assume that any one of these lines was considered as the absolute boundary of the United States for all purposes, or that the jurisdiction exercised within the line nearest to the shore should be considered as territorial and the jurisdiction beyond that line as extraterritorial. The label of "extraterritorial jurisdiction" applies: either to jurisdiction over all waters over which the United States exercises some jurisdiction, with the exception perhaps of the internal waters of the

United States (i.e. the "waters of the United States" mentioned separately in the Neutrality Act of 1794); or to jurisdiction on the high seas over domestic vessels in time of peace and war and over foreign vessels in time of war. But from the point of view of extra-territoriality, there is no valid distinction between jurisdiction over a three-, nine- or twelve-mile belt. [See, e.g., the French Memorandum of March 22, 1825, to the British Government, reproduced in 2 Smith, *Great Britain and the Law of Nations* 152-56 (1935); and the French letter of April 5, 1825, *ibid.*, at 157.]

9. The stand taken by the United States in 1793 is consistent with this approach. When Jefferson wrote his famous letters to Genet and Hammond, he was aware of the divergence of views as to the distance from shore to which States "might reasonably claim a right of prohibiting the commitment of hostilities." He discussed various limits, from one league to twenty miles, and mentioned the fact that the intermediate distance of "three leagues has some authority in its favour." The letter to Mr. Hammond, the British Minister, stated in particular that the President, "before it shall be finally decided to what distance from our sea shores the territorial protection of the United States shall be exercised," found "it necessary in the mean time, to fix on some distance for the present government of these questions." That letter also reserved for future deliberation "the ultimate extent" of the "margin of protected navigation," and mentioned that before final decision "it will be proper to enter into friendly conferences &

explanations with the powers chiefly interested in the navigation of the seas on our coast." Similarly, the letter to Genet stated that "Future occasions will be taken to enter into explanations with [other Powers] as to the ulterior extent to which we may reasonably carry our jurisdiction." It may be noted that no such conference for fixing definitive limits was held during the crucial period of 1812-1868. Conferences for that purpose were finally held in 1930 and 1958, but no agreement was reached at them.

The minimum distance of one sea-league, or three geographical miles, was chosen in 1793 provisionally only, for the express purpose of avoiding the possibility of opposition by other Powers, as it was "as little or less than is claimed by any of them on their own coasts." [6 *The Writing of Thomas Jefferson* 440, 441, 442 (ed. of 1895).] The acknowledged reason for presenting this narrow claim instead of a broader one was that in 1793 there was a desire to settle the dispute over the French captures off the American shore as quickly as possible and thus to avoid involvement in European hostilities. Consequently, it was thought necessary to make only a minimum claim which France would find difficult to reject. [See the statement by Alexander Hamilton of December 6, 1796, 6 *The Works of Alexander Hamilton* 215, at 218-19 (ed. of 1904); and the statement by Jefferson of 1805, reported in 1 *Memoirs of John Quincy Adams* 375-76 (ed. of 1874).] Once this dispute was out of the way, the United States could broaden its jurisdiction as it saw fit. Already in the 1793 correspondence, Jefferson made it clear that "The character of our coasts, remarkable in considerable

parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation, as any nation whatever." [6 *The Writings of Thomas Jefferson* 440, 442 (ed. of 1895).] He mentioned at the same time that for jurisdiction over rivers and bays "the laws of the several States are understood to have made provision" (*ibid.*), and has thus given notice to the foreign governments that in the future jurisdiction over other areas neighboring the United States may be rightfully asserted not only by action by the Federal Government but also by State laws.

In later years, Jefferson showed clear preference for broader limits, in particular for the extension of jurisdiction to the edge of the Gulf Stream. [See the Statement by Jefferson of November 30, 1805, reported in 1 *Memoirs of John Quincy Adams*, 375-76 (ed. of 1874); and the Presidential Message of December 3, 1805, reprinted in 1 *American State Papers: Foreign Relations* 66 (ed. of 1832.)]

10. Article I of the Treaty of October 20, 1818 [8 Stat. 248, at 249], between the United States and Great Britain is often cited as the proof of common acceptance of the three-mile rule as a general rule of international law. But the very language of the treaty shows that the United States renounced in its various rights and privileges in order to obtain others. It was in the interest of Great Britain rather than the United States in this case to have the boundary further from the shore, and in order to push the fishing limits back to three miles, the United States had to abandon the historic right of its citizens to fish in

some places within three miles of the coast. The limit agreed upon was simply a result of the uneven bargaining skill of the negotiators for the two parties rather than an application of a generally recognized principle. The history of the North Atlantic fisheries and of the negotiations between Great Britain and other powers with respect to them show quite clearly that each limit was the result of a series of compromises, that concessions in one area were balanced against concessions in other areas, and that frequently the same treaty contained different limits for various fishing areas. [Note, e. g., the various limits contained in Article 5 of the Treaty of Paris of February 10, 1763, 4 Davenport and Paullin, *European Treaties Bearing on the History of the United States and Its Dependencies* 92, at 93-94 (1937); and note that during the negotiations several other limits were also considered, as may be seen in the instructions for the Duke of Bedford of October 26, 1762, reprinted in 7 *British Diplomatic Instructions, 1689-1789*, 69, at 70 (Royal Historical Society, 1934), and in the letter from the Duke of Bedford of November 3, 1762, reprinted in 3 *Correspondence of John, Fourth Duke of Bedford* 144, at 147-48 (1846).]

11. Thus it can be said that the three-mile equivalent of the cannon-shot rule was not firmly established as a general principle at the beginning of the crucial period of 1812-1868. At best, it was used by some States for some purposes, but all States have used other limits for other purposes, and some States have rejected the three-mile limit as inadequate from the very beginning. The three-mile rule was even less

firmly established at the end of the crucial period, when the improvement in the range of artillery created grave doubts about the appropriateness of the three-mile restriction. As was pointed out by the French Government in 1864, when the United States claimed the right for its warships to attack the Confederate cruiser *Alabama* near the French shore in 1864, "the distance to which the neutral right of an adjoining government extended itself from the coast was unsettled" and "the reason of the old rules, which assumed that three miles was the outermost reach of a cannon shot, no longer existed." [*Papers Relating to Foreign Affairs*, 1864, Part 3, p. 104.] This change in the situation was acknowledged by the legal literature of that period. According to Hall, the precise extent of territorial waters was not certain in 1880:

> ". . . Generally their limit is fixed at a marine league from the shore; but this distance was defined by the supposed range of a gun of position, and the effect of the recent increase in the power of artillery has not yet been taken into consideration, either as supplying a new measure of the space over which control may be efficiently exercised, or as enlarging that within which acts of violence may be dangerous to persons and property on shore. It may be doubted, in view of the very diverse opinions which have been held until lately as to the extent to which marginal seas may be appropriated, of the lateness of the time at which much more extensive claims have been fully abandoned, and of the absence of cases in which the breadth of territorial water has come into international question,

whether the three-mile limit has even been unequivocally settled; but in any case, as it has been determined, if determined at all, upon an assumption which has ceased to hold good, it would be pedantry to adhere to the rule in its present form; and it is probably safe to say that a state has the right to extend its territorial waters from time to time at its will with the increased range of guns; though it would undoubtedly be more satisfactory that an arrangement upon the subject should be come to by common agreement."

[Hall, *International Law* 126-27 (1880). See also Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten* 178 (1868); Fiore, *Nuovo diritto internazionale pubblico* 174 (1865); 1 Ortolan, *Règles internationales et diplomatie de la mer* 170-71 (1856); 1 Phillimore, *Commentaries upon International Law* 237 (2d ed., 1871); Wharton, *Commentaries on Law*, 267-68 (1884); Woolsey, *Introduction to the Study of International Law* 120 (1860). *Cf., U.S. v. Smiley*, 27 Fed. 1132 (1864).] *Cessante ratione legis cessat ipsa lex* — as the principle had lost its only reasonable basis, there was no longer any reason for adhering to the principle.

12. The effect of the evidence produced in the brief of the United States for the exclusivity of the three-mile rule is rather limited, and there is an important gap in it for the crucial years 1818-1848. There can be no doubt that the theories of some writers, who have focused on the three-mile rule as a principle more certain than others, have been accepted by some Governments and became embodied in a few uni-

lateral statements or bilateral treaties. But, simultaneousy, other Governments, including such major powers as Russia, Spain and the Scandinavian States, have adopted other rules as reasonable as those approved by the first group, and have obtained support for them from many important writers, often coming from countries which have supposedly accepted the three-mile rule.

In general, the situation here is not much different from that prevailing with respect to the ten-mile limit as to bays, which was supported by the same group of States as the three-mile limit for territorial waters. In trying to determine the validity of certain Norwegian decrees of 1812, 1869, 1881 and 1889, i.e. decrees issued in about the same period as the acts of the Gulf States, the International Court of Justice pointed out that "although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law." [*I.C.J. Reports*, 1951, 116, at 131.] There can be but little doubt that the International Court of Justice would have come to a similar conclusion with respect to the three-mile limit.

13. Even if it were assumed that the three-mile rule had been accepted by international law in general, and by the United States in particular, as a basic principle for determining national jurisdiction over territorial waters, international law recognizes

exceptions based on regional peculiarities or on historic grounds. It has been noted before that the correspondence of 1793 and the statements by President Jefferson in 1805 and 1806 anticipated that special rules may be issued by the United States in view of the special "character of our coast" and the "natural boundary" of the Gulf Stream. [6 *Writings of Thomas Jefferson* 440-42 (ed. of 1895); 1 *American State Papers: Foreign Relations* 66 (ed. of 1832); 1 *Memoirs of John Quincy Adams* 375-76 (ed. of 1874).] Chief Justice Marshall stated the two basic principles with his usual clarity. In the first place: If the means adopted by a State "are such as are reasonable and necessary to secure their laws from violation, they will be submitted to." Secondly: "In different seas and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to." [*Church v. Hubbart*, 2 Cranch 187, at 234-36 (1804).] Chancellor Kent summarized the attitude of the American Government on this question as follows: ". . . in 1806, our government thought it would not be unreasonable, considering the extent of the United States, the shoalness of their coast, and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare, for the space between that limit and the American shore." [1 Kent, *Commentaries on American Law* 30 (1826).] He accepted also the idea that all waters enclosed within a line drawn from the south cape of Florida to the Mississippi should be considered to be under the control of the United States. It cannot be doubted that after the extension of the

American territory to the Rio Grande, Kent would not have hesitated to draw a similar line from the mouth of the Mississippi to the Mexican boundary. In any case, in view of the "shoalness" of the Gulf coast it can be assumed that Kent would have accepted as a valid exercise of American jurisdiction the extension of jurisdiction by the Gulf States three or four leagues into the Gulf.

14. This point of view is confirmed by the attitude taken by the United States with respect to the sea boundary of Texas and the Gulf boundary between the United States and Mexico. [See the separate Memorandum accompanying the brief for the State of Texas.] Mexico seems to have always proceeded on the assumption that its jurisdiction extended three leagues or twenty kilometers into the sea and this claim was recognized, either generally or at least for some purposes, by a series of treaties concluded by Mexico in the second half of the nineteenth century. [See, e. g., treaties between Mexico, on the one hand, and China, the Dominican Republic, Ecuador, El Salvador, France, Germany, the Netherlands, Norway and Sweden, and the United Kingdom, on the other hand, concluded between 1882 and 1899; the relevant provisions are reproduced in 1 United Nations, *Laws and Regulations on the Regime of the High Seas*, at 147, 153, 154, 156, 169, 170, 171-72 (United Nations Legislative Series, 1951).] A special regional rule of international law has thus developed in the Gulf of Mexico, based on a three-league limit, which is similar in character and scope to the four-mile regional rule developed by the Scandinavian countries. It may be noted that the validity

of the latter rule was expressly recognized by the United Kingdom in the *Norwegian Fisheries Case*, despite the fact that the United Kingdom has been the staunchest supporter of the three-mile rule in recent years. [*I.C.J. Reports*, 1951, 116, at 120, 126.] If the matter of the Gulf boundaries were submitted to the International Court of Justice for decision, the Court could easily find that the three-league rule has been established as a regional principle of international law in the Gulf of Mexico.

15. Closely connected with the principle of regional rights is the principle of "historic" rights. From the very beginning of its existence, the United States has claimed certain waters along its shore as historic waters, to a large extent on the basis of laws enacted by the States of the Union. [Opinion of Attorney General Randolph, May 14, 1793, 1 *Op. At. Gen.* 15-18 (ed. of 1841); *Stetson v. U.S.*, Court of Commissioners of Alabama Claims, 1884, 4 Moore, *International Arbitrations* 4332-41 (1898). See also *Direct United States Cable Co. v. Anglo-American Telegraph Co.*, L. R. 2 App. Cas. 394, at 419-421 (1877).] Jefferson claimed in 1793 that for various bays "the laws of the several States are understood to have made provision." [6 *The Writings of Thomas Jefferson* 440, at 441, 442 (ed. of 1895).] It is quite likely that Jefferson would have considered the enactments of the Gulf States as equally valid assertions of jurisdiction leading to the creation of "historic" rights which could be invoked by the United States in disputes with other nations. The views of Chancellor Kent, who considered a large part of the Gulf as "in-

cluded within lines stretching from quite distant headlands," would seem also sympathetic to historic claims on behalf of the United States. Except for the lone and relatively mild protest by Great Britain, no nations have made objections to the widely published treaty with Mexico of 1848, which followed the three-league rule. Such general acquiescence has created rights which should not be disturbed now, after a lapse of more than one hundred years. As the Permanent Court of Arbitration said in the Grisbadarma Case in 1909, "it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time, should be changed as little as possible." [Scott, *The Hague Court Reports* 121, at 130 (1916); see also D. H. N. Johnson, "Acquisitive Prescription in International Law," 27 *British Book of International Law* 332, at 349-53 (1950).] This principle has found application also in several decisions of the Supreme Court relating to boundaries between States. [See, e.g., *Louisiana v. Mississippi*, 202 U.S. 1, at 53-54 (1906); *Michigan v. Wisconsin*, 270 U.S. 295, at 308, 316 (1926); *Arkansas v. Tennessee*, 310 U.S. 563, at 570-71 (1940).] While there might be some difficulties in establishing historic rights in areas in which there are strong principles of international law prohibiting their acquisition, less rigid requirements can be applied in situations, such as the one involved in this case, where the rules were still flexible and to a large extent uncrystallized during the crucial period.

16. The principle that jurisdiction over the marginal sea may extend to different limits for different

purposes implies the possibility of special limits for the exploitation of the subsoil of that sea and of its natural resources. To the extent that such problems were considered by the writers of the nineteenth century, they did not consider appropriation of the sea bed and the subsoil as incompatible with the freedom of the high seas. [For a summary of their views, see H. Lauterpacht, "Sovereignty over Submarine Areas," 27 *British Year Book of International Law* 376, at 399-402 (1950). *Cf.* 1 Fiore, *Nouveau droit international public* 371 (1868).] Various States have made claims in the eighteenth and nineteenth century to those portions of the sea bed which contained such exploitable natural resources as pearl oysters, chanks, corals and sponges. [See, e.g., Sir Cecil Hurst, "Whose Is the Bed of the Sea?" 4 *British Year Book of International Law* 34-43 (1923-24).] Great Britain, by the Cornwall Submarine Act of 1858, made "all mines and minerals lying below low water mark under the open sea adjacent to" the County of Cornwall a "part of the soil and territorial possessions of the Crown." [21 & 22 Vict. c. 109, s. II (1858 ed., at p. 923).]

While the jurisdictional claims of the Gulf States were general in terms, they were certainly valid with respect to all exploitable areas of the Gulf of Mexico included within the designated limits. It cannot be doubted that, if the question of mineral resources of the continental shelf were raised between 1812 and 1868, their exploitation and control by the Gulf States up to the three-league limit would have been

considered as valid under the then prevailing rules of international law.

17. *Conclusions.* The following rules of international law relevant to the issues in this case have prevailed in the crucial period (1812-1868) either generally or at least in so far as the United States was concerned:

(a) Each State was entitled to a reasonable amount of jurisdiction and control over the sea adjoining its territory to such a distance as was reasonably necessary to protect its various interests.

(b) This rule of reasonableness permitted the adoption of varying limits for different purposes, and almost all States concerned have adopted at least two different limits for the protection of different kinds of interests.

(c) At the end of the eighteenth century, previous claims to 60 or 100 miles were no longer considered reasonable. The range of valid claims was between three and twenty miles. Self-limitation to three miles by some States constituted an abandonment of rights previously acquired.

(d) The three-mile limit, representing a temporary adaptation of the cannon-shot rule, was adopted only by some States, and even by them only for certain purposes, concurrently with other limits for other purposes.

(e) The three-mile limit was adopted by the United States in order to avoid further arguments

with France and was conceived at that time as only a minimum, provisional limit. There is no indication that a later assertion of jurisdiction "within the limits of the Gulf Stream" raised any objections. In fact, this new limit was considered by Chancellor Kent as a more adequate rule than the minimum limit of three miles.

(f) Simultaneously with the three-mile limit for some purposes, the United States adopted a four-league limit for other purposes.

(g) Not only were different rules permitted for different purposes, but there was also a development of divergent regional rules in various areas of the world. Consequently it was permissible for the United States to establish, through express or tacit approval of the acts of the Gulf States, a regional rule of three leagues for the Gulf of Mexico. This development was approved by the only other nation directly concerned, i.e. Mexico, by the treaties of 1848 and 1853. The lone protest by Great Britain did not invalidate this action in view of the tacit acquiescence of other nations. This acquiescence led to the establishment of historic rights of Mexico and the United States (and its Gulf States) to a three-league belt in the Gulf of Mexico.

(h) The rights of a State within the three-league limit in the Gulf of Mexico were broader with respect to the resources of the subsoil than they were with respect to the waters of that area. If there might have been some doubt about the extent of general jurisdic-

tion over the belt of waters up to the three-league limit, no such doubt did exist about the rights of the neighboring States to exploit the natural resources of the sea in that belt or even outside of it.

(i) Consequently the acts of the Gulf States establishing a three-league boundary in the Gulf of Mexico were not contrary to any rules of international law prevailing at the relevant dates.

EXHIBIT II

Memorandum on the Question of Whether or Not the Maintenace of a Three-League Maritime Boundary in the Gulf of Mexico by the American Gulf States, at the Time They Became Members of the Union, was in Accord with International Law

by

Stefan A. Riesenfeld*

Part I

Context, Scope and Nature of the Problem to be Discussed

Prefatory Remarks

(1) Questions of international law, especially customary international law, frequently present extremely fundamental and complex problems, the answers to which hinge on a careful evaluation of a multitude of heterogeneous and, in many respects, elusive factors. As a result it is of pivotal importance that the issues which are sought to be resolved are clearly understood and defined. Therefore, even at

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the risk of appearing pedantic, tedious or verbose, pains will be taken in this memorandum to place the questions studied in their proper contextual, juristic and historical setting.

1.

Context of the Problem: Its Statutory Origin

(2) The problem to be examined, although involving questions of customary international law as existing at particular dates, arises out of a conceivable—though by no means unavoidable or indicated—construction of a United States statute, the Submerged Lands Act of 1953. [1]

Sec. 3(a) of this act provides:

> "It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources . . . be, and they are hereby, . . . recognized, confirmed, established, and vested in and assigned to the respective States . . ."

[1] 67 Stat. 29 (1953).

Sec. 2(b) of the same statute gives the following definition:

> "The term 'boundaries' includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico . . . as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term 'boundaries' or the term, 'lands beneath navigable waters' be interpreted as extending . . . more than three marine leagues into the Gulf of Mexico."

Sec. 4 finally adds:

> "Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyound three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

The exact legal significance of the phrase underlying the first alternative, to wit: "boundaries in the Gulf of Mexico . . . as they existed at the time such State became a member of the Union," is one of the

matters in dispute between the United States and the Gulf States and presents various ramifications.

(3) One of the contentions made is that a boundary in the Gulf of Mexico can only have "*existed* at the time the State became a member of the Union" within the meaning of the statute if at that time such boundary was not in contravention of international law.

Accordingly, if this construction is adopted it is necessary to ascertain whether, at the date each of the Gulf States became a member of the Union, its boundary as it existed at that time was not violative of a rule of international law.

(4) Since the States involved became members of the Union at *different dates* and under *different circumstances* it is by no means obvious that the question necessitates the same answer for each of the six States involved. Therefore, this memorandum must take account of the varying bases of the boundary claims of the six States involved.

In this connection it must also be kept in mind that international law can be said to be pertinent only insofar as alternative (a) is concerned, and that this memorandum need not deal with the question of international law as it existed at a time subsequent to acquisition of Union membership status when such boundary might have been "approved by Congress."

(5) The boundary of Texas possesses certain distinct legal features by reason of the fact that Texas enjoyed independent statehood before she became a member of the Union and that her boundaries were explicitly defined by a statute of the Republic of Tex-

as of December 19, 1836,[2] which remained in force at any rate until Texas became a member of the Union by virtue of the Joint Resolution of Congress of December 29, 1845.[3] The statute in question regulated the maritime boundary as follows:

> "beginning at the mouth of the Sabine River and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande."

(6) The situation of the other four Gulf States is different in that their territories came under United States' sovereignty by virtue either of the Louisiana Purchase or the Spanish Cession of 1819, and that their boundaries as existing at the time of their acquisition of Union membership depend either on action taken by France or Spain during the periods of their sovereignty over the area involved or upon Congressional action taken in defining the territorial boundaries or admitting such territories to statehood in the Union. The critical dates involved are 1811 (Louisiana),[4] 1817 (Mississippi),[5] 1819 (Alabama),[6] 1845 (Florida).[7]

This memorandum is not directly concerned with the question of whether or not a boundary outside of the three-mile line was established by local law at

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[2] Laws of the Republic of Texas (in two volumes), 133 (1838).
[3] 9 Stat. 108.
[4] 2 Stat. 701.
[5] 3 Stat. 472.
[6] 3 Stat. 608.
[7] 5 Stat. 742.

those dates, but only whether *if* it was so established by local law (of whatever nature) it was not violative of international law.

2.

Scope and Nature:

Import of being "not violative of international law"

(7) Perhaps the most crucial problem respecting this aspect of the controversy is an exact understanding of the significance of the possible requirement that the boundary as established by state action must not have been "not violative of international law." Not only is the issue, if properly defined, one which is principally a matter of historical nature, but it is also one which goes to the heart of the whole fabric and structure of international law because it boils down to the fundamental dilemma of whether that which must be established is the *existence* of a *permissive* rule or the *absence* of a *prohibitory* rule.

(8) This, as is apparent, is a conundrum analogous to that which had to be faced by the Permanent Court of International Justice in the celebrated case of the SS *Lotus* [8] in 1927.

In that case the Court was confronted with the question of whether Turkey had acted in conflict with international law by instituting criminal proceedings under Turkish law against a French merchant marine officer charged with having committed a criminal offense under Turkish law as the result of a collision on the high seas between a Turkish and a

[8] P.C.I.J. Rep. Ser. A, No. 9 (1927).

French vessel. The French Government contended that Turkey, in order to have jurisdiction, should be able to cite a rule of international law authorizing her to exercise jurisdiction; Turkey conversely claimed that she was entitled to exercise jurisdiction with respect to any occurrence whenever such jurisdiction was not in conflict with a principle of international law.

The majority of the Court, in a much-discussed opinion, underscored that in deciding the controversy it was confronted "by a question of principle." [9] It held that Turkey's position was correct and that the question was whether there existed any rules which prohibited Turkey from taking criminal proceedings in the particular case. The Court stated in a now famous passage: [10]

> "This way of stating the question is . . . dictated by the very nature and existing conditions of international law.
>
> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."

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[9] *Id.* at 18.
[10] *Ibid.*

As a result of this fundamental approach the Court concluded that reliance on a permissive rule of international law authorizing exercise of jurisdiction in reference to an act occurring abroad would be required only "if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases." [11] However, the Court held that "this is certainly not the case under international law as it stands at present." [12] Accordingly, international law left to states "a wide measure of discretion" in the premises.

(9) Applying the approach and the analysis of the *Lotus* case to the question to be examined in the instant controversy, it follows that a maritime boundary of three leagues, or any other reasonable distance, from the shore cannot be said to have been violative of international law at a critical time unless it can be shown

(a) either, that at that time an accepted rule of customary law prohibited claims to a territorial belt of that particular width,

(b) or, that at that time the principle of the freedom of the seas was established in such absolute and all-embracing terms that any claim to a territorial belt of a particular breadth must be based on a particular sanction (title or permissive rule) of international law.

[11] *Id.* at 19.
[12] *Ibid.*

Neither alternative, however (as will be shown later in much greater detail), finds a base in the actual evolution of international law with reference to the freedom of the seas and territorial waters. So far as the alternative listed under (b) is concerned, it may perhaps be mentioned already in this connection that the Court of International Justice in the Fisheries Case (*U. K. v. Norway*) [13] neatly and correctly distinguished between "historic titles justifying situations which otherwise would be in conflict with international law" and "application of general international law to a specific case." [14]

(10) As a result of the necessity of canvassing the two indicated alternatives it is necessary to turn to the task to be performed in ascertaining the existence or non-existence of a rule or principle.

3.

Method to be Pursued: Ascertainment of existence or non-existence of a rule of international law

(11) There is no question that the ascertainment of the existence or non-existence of a rule of customary international law is one of the most difficult juridical tasks, because it requires a marshalling of quite heterogeneous items of evidence. Since the international community is a fluid society and is in a state of continuous change and, perhaps, progressive

[13] I.J.C. Rep. 1951, 115 ff.
[14] *Id.* at 131.

development, customary international law likewise is not a stable and solidified body but flexible and subject to constant adaptation, differentiation and refinement. The determination of its content at a particular date therefore requires most careful and meticulous historical research.

(12) The nature and formation of rules of international law are usually treated by the writers on international law under the heading of Sources of International Law.[15] It is commonly stated [16] that ternational law under the heading of Sources of International Law.[16] It is commonly stated that customary international law is based on the tacit general agreement of the members of the international community that a certain conduct in the international arena is required or prescribed as a matter of law; but it is also commonly admitted that the establishment of such tacit general agreement presents tremendous difficulties.

Thus Dionisio Anzilotti, the late President of the Permanent Court of International Justice and Professor of International Law at the University of Rome, states:

"The facts in which the tacit accord manifests itself must consist in actions on the part of

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[15] See especially Anzilotti, Cours de Droit International, Vol. 1. (Traduction Francaise d'après la troisième édition italienne par G. Gidel), 66 ff. (1929); Rousseau, Principes Généraux du Droit International Public, Vol. 1 (Introduction, Sources), 106 ff. (1944); Oppenheim-Lauterpacht, International Law, Vol. 1, 23 ff. (8th ed. 1955).

[16] See *e.g.*, Anzilotti, *op. cit. supra* note 15, at 73 ff.; Rousseau, *op.cit.supra* note 15, at 815 ff.; Oppenheim-Lauterpacht, *op.cit.supra* note 15, at 15ff., 25 ff.

the States in the domain of international relations, from which there can be culled their intention to conduct themselves reciprocally and as a matter of obligation in a particular manner." [17]

But he hastens to add,

"It is easy to understand that the determination of the existence or scope of a rule resulting from the manner in which the States conduct themselves presents great difficulties. The factual data for such determinations are furnished by history, especially the history of international relations." [18]

(13) The celebrated Article 38 of the Statute of the International Court of Justice is in full harmony with the accepted ideas about custom as one of the principal sources of international law. It specifies that the Court, in deciding cases in accordance with international law, shall apply:

"b. international custom, as evidence of a general practice accepted as law."

Although Professor Hudson, in commenting on the same words in the statute of the P.C.I.J., has observed that "this might have been cast more clearly as a provision for the Court's applying customary law," [19] the phrasing was retained in the statute of the pre-

[17] *Op.cit.supra* note 15, at 74 [my translation].
[18] *Id.* at 77 [my translation].
[19] Hudson, The Permanent Court of International Justice 1920-1942, 609 (1943).

sent Court [20] and has not proven to be a source of trouble or in need of particular clarification. [21]

It is important to note that the custom must be "accepted as law" and must be pursuant to "general practice." The latter requirement deserves a few further comments.

(14) In discussing the idea of "common consent" as the basis of international law Judge Lauterpacht asks:

> "What, now, does the term 'common consent' mean?" [22]

In answering his own question Sir Hersch continues:

> "If it means that all the individuals who are members of a community must at every moment of their existence expressly consent to every point of law, such common consent could never be proved .... 'common consent' can therefore only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance as compared with the community viewed as an entity in contradistinction to the wills of its single members. The question whether there be such a common consent in a special case is not a question of theory, but of fact only. It is a matter of obser-

[20] Hudson, The Twenty-Fourth Year of the World Court, 40 Am.J.Int'l L. 1, at 35 (1946).

[21] Rosenne, The International Court of Justice, 421 (1957).

[22] Oppenheim-Lauterpacht, International Law, Vol. I, 15 (8th ed. 1955).

vation and appreciation, and not of logical and mathematical decision . . ." [23]

However, once a rule of international law has come into existence it remains binding, despite a possibility that a state might become dissatisfied with it. Writes Sir Hersch:

> "On the other hand, no State can at some time or another declare that it will in future no longer submit to a certain recognised rule of the Law of Nations. The body of the rules of this law can be altered by common consent only, not by a unilateral declaration on the part of one State. This applies not only to customary rules, but also to such conventional rules as have been called into existence through a law-making treaty . . . ." [24]

Hence, changes in customary international law result from the same process as their creation.

(15) Other modern authors have advanced analogous views, sometimes with the addition of further clarifications and qualifications. Professor Rousseau, in particular, when discussing the "degree of generality" of acceptance required for the formation of a rule of customary international law points out:

> "With respect to the degree of generality required, textwriters ordinarily discard the necessity of unanimity and insist solely upon the consent of the States which have found themselves

[23] *Id.* at 17.
[24] *Id.* at 18.

in a situation where they had to apply [the practice] and the absence of protests from the others." [25]

In a footnote, however, he cautions,

"According to the principles actually in force, it is clear that a customary norm would not acquire universal force by the mere fact that it is accepted by the majority of States which belong to the international community. It is impossible to demonstrate the existence of a rule which introduced the majority principle as a proper criterion for the universal extension of customary norms." [26]

The author refers, however, specifically to the decision of the U. S. Supreme Court in *The Paquete Habana* [27] for the proposition that a nation may be bound by a rule of customary international law even though it had not applied the same prior to a particular occasion, so long as its government had not prevented by protest or other public act the general acceptance thereof.

(16) Perhaps it is useful to note in this connection that once a custom has found general acceptance as a rule of law mere unilateral action by one state is not enough to abrogate it as a matter of international force even with reference to that nation. True, national courts may have, under certain conditions, a duty to ignore it, but such enforced disregard is a

[25] Rousseau, Principes (généraux du Droit International Public, Vol. 1, 838 (1944) [my translation].
[26] *Ibid.* [my translation].
[27] 175 U.S. 677 (1900).

matter of domestic law only and does not necessarily terminate the international force of the rule.

This proposition is all which a famous dictum by Lord Atkin in *Chung Chi Cheung v. The King* [28] implies. Said his Lordship:

> "It must always be remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals." [29]

4.

Necessity and Sufficiency of Acceptance by the United States

(17) The principles discussed above apply not only when and where an international tribunal has to ascertain the existence and scope of a rule of customary international law, but in principle also when such task confronts an American court.

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[28] [1939] A. C. 160 (J. C. 1938).
[29] *Id.* at 167.

Thus, as has been pointed out before, the U. S. Supreme Court has held that a rule of the sea which may be regarded as accepted by the other maritime nations must be taken judicial notice of and given effect to by the U. S. courts "in the absence of any . . . public act of their own government in relation to the matter." [80] This case involved the legality of the capture, off the shores of Cuba, of a Spanish fishing vessel by an American vessel during the war with Spain; the Court, after most careful examination of all available material, concluded that a rule excepting unarmed local fishing boats from capture during maritime warfare had become a rule of international law and declared the capture unlawful.

(18) Much more complex, however, is the converse of this situation, which poses the problem whether and to what extent an American Court may examine the acceptance of a rule by other nations where United States policy has been formulated in favor of such rule.

It must be conceded that there is abundant American judicial authority for the proposition that the courts, when the adjudication of the rights of individual litigants depends upon issues involving the foreign relations or policy of the United States, will bow to a determination by the executive branch of the Government and not make inconsistent rulings. This has been applied with respect to the extent of foreign sovereignty, [81] American territorial claims, [82]

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[80] The Paquete Habana, 175 U.S. 677, at 708 (1900).
[81] Williams v. Suffolk Insurance Co., 13 Pet. 415 (1839).
[82] Jones v. U.S., 137 U.S. 202 (1890).

and numerous other matters, including even the validity of acts of foreign governments. [33].

But this judicial self-restraint, although perhaps appropriate where matters of foreign policy are at stake, has no place when no concrete executive determination of a matter involving foreign relations is in issue and when no international embarrassment is even remotely foreseeable. This is so particularly in view of the fact that the United States has asserted internationally the right to the continental shelf [34] and that the only question in issue is the scope of the allocation of such rights to certain States.

(19) Certainly the question as to the state of international law relating to territorial waters at a particular historical date is not a matter with respect to which recent executive policy decisions as to the limits of territorial waters have any bearing. It seems to be quite obvious that if a decision on that issue is at all necessary the American court must determine it in such fashion as an international tribunal at that time would have determined it. In such case, however, it would not be sufficient by itself, even if the United States had considered a certain rule as established at that time, unless a general acceptance by other maritime powers could also be proven.

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[33] Bernstein v. N.V.Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

[34] See especially the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953).

5.

Resulting Scope of the Inquiry

(20) From what has been said it follows that it must be examined whether at any time prior to 1845 there was a custom accepted as law by the maritime nations which

(a) either prohibited the establishment of a maritime boundary at three leagues from the coast,

(b) or required the assent by other maritime nations to the establishment of such boundary.

Part II

The Evolution of International Law Relating to Jurisdiction Over the Maritime Belt

1.

General Considerations

(21) Basically the task to be performed in this part of the memorandum is a study of the development of state practice regarding the maritime belt and of the impact of the text-writers, with a view to ascertaining whether or not a definite international custom accepted as law can be said to have been established at any time for fixing a definite seaward boundary of the coastal states.

This, of course, is an enterprise which has been undertaken by many authors who, each in turn, have

compiled a vast amount of materials with respect to different maritime nations and different epochs. Especially important in that respect are the investigations by Fenn, [35] Fulton, [36] Kent, [37] Masterson, [38] Meyer, [39] Raestad [40] and, it is hoped, the undersigned, [41] and, for a particular aspect, Mouton. [42] On the basis of the findings of these authors and some supplemental materials published in various places, the historical picture today is much clearer than in earlier days.

(22) In appraising the situation care must be taken to take notice of the gradual refinement and differentiation of the issues involved. While originally the accommodation of conflicting particular interests was sought to be brought upon a general denominator, today it is clear that the types of interests of the coastal states involved, as well as the geographical location, may supply determinative factors in the legal evaluation of claims.

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[35] Fenn, Origins of the Theory of Territorial Waters, 20 Am.J. Int'l L. 465 (1926), and Fenn, The Origin of the Right of Fishery in Territorial Waters (1926).

[36] Fulton, The Sovereignty of the Seat (1911).

[37] Kent, The Historical Origins of the Three-Mile Limit, 48 Am.J. Int'l L. 537 (1954).

[38] Masterson, Jurisdiction in Marginal Seas with Special Reference to Smuggling (1929).

[39] Meyer, The Extent of Jurisdiction in Coastal Waters (1937).

[40] Raestad, La Mer Territoriale (1913). This work is an in part abbreviated and in part revised version of a monograph entitled Kongens Strömme by the same author published in the Norwegian language in 1912.

[41] Riesenfeld, Protection of Coastal Fisheries under International Law (Carnegie Endowment for International Peace, Monograph No. 5) (1942).

[42] Mouton, The Continental Shelf (1952).

2.

The Pre-Grotian Era and the Impact of Grotius' Ideas

(23) The doctrine of the marginal sea viewed as an historical phenomenon can be likened to a muddy stream with shifting banks and different headwaters.

Roman law had no occasion to concern itself with the international status of the adjacent sea but declared simply in a famous passage that sea and seashore were common to all.[13] When, however, the Italian city republics emerged as sovereignties in the Renaissance period and laid claims to the adjacent seas, a legal theory of territorial waters in the international sense began to appear[14] in the writings of the so-called *Post-Glossators*, especially of Bartolus and Baldus. The Roman sources presented no serious obstacle in that respect, as the differentiation between the three concepts of use (usus), ownership (proprietas) and jurisdiction (jurisdictio) offered a convenient solution. It was the celebrated Bartolus of Saxoferruto who advanced the notion that jurisdiction over land included jurisdiction over the adjacent sea within moderate limits, fixed by him at

[13] Digests, lib. 1, title 8, lex 2.

[14] Professor Fenn, Origins of the Theory of Territorial Waters, 20 Am. J. Int'l L. 465 (1926), ascribes the doctrine of "jurisdiction" over the sea to the earlier school of the Glossators. But the passage which he cites " . . . proprietas tamen est nullius . . . sed jurisdictio est Caesaris . . . '" may be one of the later "additions to Accursius' work" which were deplored more than a hundred years ago by Savigny, Geschichte des Römischen Rechts in Mittelalter, Vol. 5, p. 302 (2d ed. 1850). Unfortunately, I had no opportunity to pursue this question.

100 *miles.*[45] His views, including the 100-mile limit, were reiterated and expounded by a multitude of writers,[46] including, above all, the equally famous Baldus of Ubaldi.[47] This theory of the Italian jurists found acceptance by later writers of other nations, especially the celebrated French Jean Bodin (1577) who converted the 100 Italian miles into 30 leagues.[48]

(24) Concurrently with, but independently of, the evolution of the doctrines of the Italian school, the Nordic states developed a practice which selected the *range of sight* as the limit for various aspects of territorial jurisdiction over the adjacent sea by the coastal state, especially for exclusive fishing rights. Professor Raestad has given a careful account of the dispersed and vague indications in this respect[49] and also has pointed out that this Nordic practice was apparently transplanted into the Norman kingdom of Sicily where it was recognized by writers on feudal law of the fifteenth century[50] and survived as a matter of treaty law even into the eighteenth century.[51]

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[45] See Fenn, *op.cit.supra* note 44, at 477.

[46] *Id.*, ftns 31 and 32.

[47] Some writers have alleged that Baldus reduced the limit to sixty miles, but this view seems to have been exploded by Raestad, La Mer Territoriale, 20 ftns. 2 (1913), although it is repeated again by Sereni, The Italian Conception of International Law, 73 (1943).

[48] See Raestad, *op.cit.supra* note 47, at 20 and 62.

[49] See Raestad, *op.cit.supra* note 47, at 28 ff.

[50] See Raestad, *op.cit.supra* note 47, at 18, citing William of Perno.

[51] Treaty between the Kingdom of the Two Sicilies and the Ottoman Empire of April 7, 1740, printed in 1 Wenck, Codex Juris Gentium, 519 (1781). See the comments by Raestad, *op.cit.supra* note 47, at 55, and Sereni, The Italian Conception of International Law, 29 (1943).

(25) In practice, from time to time much more ambitious claims over certain portions of the sea were made in the Mediterranean [52] as well as in the Baltic and the North Sea. [53] It was especially, however, the extravagant claims of Portugal and Spain, which barred the trade with their colonies, that aroused angry reactions on the part of the English and the Dutch [54] and prompted the publication of Hugo Grotius' famous tract on the Freedom of the Seas. [55] In this treatise Grotius dealt chiefly with navigation and commerce and specifically excluded that portion of the ocean which lies within the range of sight. [56] Moreover, in later writings he conceded expressly jurisdictional rights over portions of the sea and advanced the view that such jurisdiction could be gained either from the coast or by means of a fleet. [57]

(26) Grotius' thesis and Dutch claims based thereon found lively repercussions and initiated a veritable diplomatic and literary battle. Shortly after the publication of the Mare Liberum James I issued a Proclamation for the Restraint of Foreign-

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[52] For the claims of Pisa, Genoa, Venice and Naples see Sereni, *op.cit.supra* note 51, at 29 ff., 73 ff.

[53] For the claims of Denmark-Norway, see Raestad, *op.cit.supra* note 47, at 57 ff.

[54] For details see Fulton, The Sovereignty of the Sea, 105 ff.

[55] Hugo Grotius, Mare Liberum, Sive de Jure Quod Batavis Competit Ad Indicana Commercia Dissertatio (Ed. by J. B. Scott, Carnegie Endowment for Intern. Peace 1916).

[56] Mare Liberum, 37 (Carnegie Endowment Edition, 1916); see the comments by Riesenfeld, Protection of Coastal Fisheries Under International Law, 12 (1942).

[57] See the analysis of Grotius' views by Riesenfeld, *op.cit.supra* note 56, at 17.

ers Fishing on the British Coasts [58] which prompted remonstrations on the side of the Dutch and the opening of negotiations. On this occasion the Dutch commissioners in 1610 took the position that "it is by the law of nations that no prince can challenge further into the sea than he can command with a cannon," a statement which has been deemed to be the diplomatic origin of the cannon-shot rule, [59] perhaps inspired by Grotius himself.

(27) Nevertheless, this pronouncement of the cannon-shot rule remained for a long time an isolated and ignored event, and the rule gained currency only when it was re-formulated and propounded by another celebrated Dutch publicist, Cornelis van Bynkershoek, who in his book De dominio maris, [60] first published in 1702, gave the twin doctrines of the freedom of the high sea and the sovereignty over the adjacent sea a widely followed pattern. It seems likely that Bynkershoek was influenced by the recent actions of the French, who on the one hand had claimed vis-à-vis Denmark in 1691 that neutrality could not be enforced beyond a cannon-shot range, and on the other hand had insisted vis-à-vis other powers that neutrality must be asserted within that limit. [61]

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[58] See Fulton *op.cit.supra* note 54, at 145 ff. and 755.

[59] See the references by Fulton *op.cit.supra* note 54, at 155, 156 and 1 Marsden, Documents Relating to Law and Custom of the Sea, 487 (Navy Records Society 1915).

[60] De dominio maris, 1702, re-edited with translation by Magoffin in the Classics of International Law (Carnegie Endowment for International Peace, 1923).

[61] See the references in Walker, Territorial Waters: The Cannon Shot Rule, 28 Brit.Y.B. Int'l L. 210, at 215 ff. (1945); Kent, The Historical Origins of the Three-Mile Limit, 48 Am. J.Int'l L, 537, at 541 (1954).

3.

Eighteenth Century Theory and Practice

(28) The assertion of the cannon-shot rule by Bynkershoek persuaded numerous later writers to follow suit and make similar statements. While no particular purpose would be served by giving a complete catalogue of the eighteenth-century writers who endorsed that principle, it may be stated that the newly emerging positivistic German school of international law, as represented by Moser and Surland, lent its support thereto. [62] Even more important for the career of this rule was its adoption by Emmerich de Vattel, whose Le droit des gens (1758) became one of the most authoritative treatises on the Law of Nations during the second half of the eighteenth century. [63] He wrote (quoting from the first English edition of 1760):

> "It is not easy to determine to what distance a nation may extend its rights over the sea by which it is surrounded. Bodinus pretends, that according to the common right of all maritime nations, the prince's dominion extends even thirty leagues from the coast. But this exact determination can only be founded on a general consent of nations, which it would be difficult to prove; each state may, in this respect, ordain

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[62] For detailed references see Riesenfeld, Protection of Coastal Fisheries Under International Law, 22 (1942).

[63] See the references by Riesenfeld, *id.* at 22 ff.

> what it shall think best, in relation to what concerns the citizens themselves, or their affairs with the sovereign: but between nation and nation all that can reasonably be said, is, that in general the dominion of the state over the neighboring sea, extends as far as is necessary for its safety, and it can render it respected .... At present the whole space of the sea within cannon-shot of the coast is considered as making part of the territory, and for that reason a vessel taken under the cannon of a neutral fortress is not a good prize." [64]

(29) Nevertheless, Vattel's views neither reflected the universal opinion of authoritative text-writers nor of the majority of maritime nations. Thus the celebrated Spanish author, de Abreu y Bertodano, in his Tratado Juridico-Politico Sobre Presas de Mar, which appeared first in 1746, [65] thought that the breadth of the marginal sea could vary between two leagues, as claimed under the British Hovering Acts, and one hundred miles, according to the nature and location of the coast involved. These views were taken as the starting point for the position of the equally famous French writer Valin, who suggested that two leagues were the *ordinary* limit for the breadth of the territorial sea and that states were at liberty to go beyond that limit where the sounding of the

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[64] Vattel, The Law of Nations, 115 (English Translation 1760).

[65] De Abreu y Bertodano, Tratado Juridico-Politico Sobre Presas de Mar, 86 (1746).

bottom was still possible and commercial navigation was not impeded by such claims. [66]

(30) The cannon-shot rule was never accepted by Denmark-Norway which, after making much more extravagant pretenses to dominion over the Northern and the Baltic Seas, gradually reduced such claims for neutrality and fishing purposes first to four leagues and later to one league, the term "league" referring to the Danish-Norwegian league equalling four nautical miles. [67] Sweden apparently adopted the cannon-shot rule for neutrality purposes and only with respect to ports between 1715 and 1756, but in that year the principle of the range of vision was established or re-established. In 1758 the dominion of Sweden was declared to extend three (long) miles (equalling 12 nautical miles) out into the open seas, and in 1779 this measure was reduced

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[66] 2 Valin, Nouveau Commentaire sur L'ordonnance de la Marine, 688 (1766): "Jusqu'à la distance de deux lieues, & avec cette restriction encore, la mer est donc du domaine du Souverain de la côte voisine; & cela que l'on puisse y prendre fond avec la sonde, ou non. Il est juste au reste d'user de cette méthode en faveur des États dont les côtes sont si escarpées, que dès le bord on ne peut trouver le fond; mais cela n'empêche pas que le domaine de la mer, quant à la jurisdiction & à la pêche, ne puisse s'étendre au delà; soit en vertu des traités de navigation & de commerce, soit par la règle ci-dessu établie qui continue le domaine jusqu'ou la sonde peut prendre fond, ou jusqu'à la portée du canon . . . "

[67] For details see Meyer, The Extent of Jurisdiction in Coastal Waters, 478 ff., especially at 496 and 499 (1937); Riesenfeld, *op.cit.supra* note 62, at 211, 212 and 224; Kent, The Historical Origins of the Three-Mile Limit, 48 Am. J.Int'l L. 537, at 540, 544.

to one long mile (equalling four nautical miles). [68]

(31) Spain specifically adoped a two-leagues limit for anti-smuggling purposes in a royal order of December 17, 1760, and confirmed this measure by royal ordinance of May 1, 1775. [69] With respect to neutrality purposes, Spain expressly abandoned the cannon-shot rule in 1797 and reduced her own neutrality belt to only two nautical miles, [70] but reverted in an ordinance of June 20, 1801, to a cannon-shot rule/reciprocity system with respect to her own captures. [71] Generally speaking, however, two leagues came to be the general maritime boundary of Spain and her colonies. [72]

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[68] For details and references see Meyer, *op.cit.supra* note 67, at 54; Riesenfeld, *op.cit.supra* note 62, at 192. The cannon shot rule is found in an ordinance of February 8, 1715, with reference to captures in Swedish waters, and in a decree of July 28, 1741, relative to captures by Swedish vessels in waters of friendly powers, but confined to captures near ports; see De Staël-Holstein, Le régime Scandinave des eaux littorales, 51 Rev. de droit intern. et de législ. comp. 630, at 644 (1924); Gihl, La limite des eaux territoriales de le Suéde, 53 Rev. de droit intern. et de législ. comp. 525, at 534 (1926). It should be pointed out that Kent, Historical Origins of the Three-Mile Limit, 48 Am.J.Int'l L. 537, at 550 ftn. 69, is very much in error in asserting that the "mile" in the Swedish decree of 1758 was equivalent to the modern nautical mile. This mistaken idea has long been refuted by Gihl, *op.cit.* at 541; Soderquist. Droit International Maritime Suédois, 69 (1930); Meyer, *op.cit.* at 67, Riesenfeld, *op.cit.* at 192.

[69] For the text of these decrees see Riquelme, Elementos de Derecho Publico Internacional, con esplicacion de todas las reglas que, segun los Tratados etc. constituyen el Derecho Internacional Español, 187, 194, 197 (1849).

[70] Novisima Recopilacion de las Leyes de España, lib. VI, tit. 8 l. v (1831).

[71] Novisima Recopilacion de las Leyes de España, lib. VI, tit. 8 l. IV, § 35.

[72] 1 Riquelme, *op.cit.supra* note 69, at 213; see Riesenfeld, *op.cit.supra* note 62, at 38 and 175.

(32) It was not until 1782 that the three-(nautical) mile rule was first proposed as an equivalent to the cannon-shot rule. This idea originated with the Italian writer Galiani, who observed that it seemed reasonable to him to determine once and for all that the territorial sea should extend to three miles from land, which at that time equalled the greatest distance a cannon could shoot. [73] Galiani's suggestion was taken up by his fellow-countryman Azuni in 1795 [74] and gradually gained widespread acceptance, not only because of the author's own reputation, [75] but principally because it had meantime found endorsement by the United States.

(33) In order to appraise correctly the development and status of international law relative to the adjacent sea during the eighteenth century, it is especially important to take into consideration a series of significant treaties governing maritime interests other than those connected with neutrality and naval war and concerning non-European regions. The first of these instruments is the Treaty of Utrecht of 1713. This treaty, which contained the cession of Newfoundland and Nova Scotia by France to Great Britain, reserved certain privileges to French fishermen, but barred them from fishing in the seas, bays and other places within *thirty leagues* on the southeast coast of Nova Scotia, commencing from the island, commonly called Isle of Sables, in-

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[73] Galiani, Dei doveri dei principi neutrali verso i principi guerreggianti, e di questi verso i neutrali (1782).

[74] Azuni, Systema universale dei principii del diritto marittimo dell' Europa (1795).

[75] See Riesenfeld, *op.cit.supra* note 62, at 26.

clusively, and continuing toward the southwest.[76] Fifty years later the Treaty of Paris between France, Great Britain and Spain (1763) stipulated in Article V that the French subjects should "not exercise the said fishery but at the distance of *three leagues* from all the coasts belonging to Great Britain, as well those of the continent, as those of the islands situated in the Gulf of St. Lawrence. And as to what relates to the fishery on the coasts of the Island of Cape Breton, out of the said gulf, the subjects of the Most Christian King shall not be permitted to exercise the said fishery but at the distance of fifteen leagues from the coasts of the Island of Cape Breton."[77] These provisions were renewed and confirmed twenty years later in the Treaty of Versailles.[78] It is interesting to note that identical terms were proposed for American fishermen by Great Britain in the negotiations of the peace treaty with the United States but that the United States commissioners refused to accede thereto.[79] Finally in 1790 Great Britain agreed in Article IV of the Escurial Treaty with Spain that her subjects should not navigate or engage in fishing within a distance of ten leagues from any part of the coast already occupied by Spain.[80]

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[76] Treaty of Utrecht (1713), Art. XII, 8 Dumont, Corps universel diplomatique du droit des gens, 339, 341 (1731).

[77] Treaty of Paris (1763), 1 Martens, Recueil de traités d'alliance etc., 104 (2d ed. 1818) (emphasis added).

[78] Treaty of Versailles (1783), 3 Martens, Recueil etc., 541 (2d ed. 1818).

[79] North Atlantic Coast Fisheries Arbitration, Case of the United States, 11; and Appendix, 219 (1909).

[80] 4 Martens, Recueil etc., 493 (2d ed. 1818).

All this seems to prove that at that time neither Great Britain nor the other European powers did consider the cannon-shot or three-mile rule the accepted international standard for all purposes and that they were willing to demand and concede larger belts, especially in non-European waters.

(34) It is quite significant for the subsequent development that G. F. von Martens—undoubtedly the most influential writer on international law of his days [81] —at the turn of the eighteenth century propounded the view that the states were entitled to claim a territorial belt up to three leagues.

Von Martens published the first edition of his Précis du Droit des Gens Moderne de l'Europe in 1789. It was received in the United States not long thereafter, and the United States Government is said to have persuaded Wm. Cobbett to prepare a translation. [82] The American edition was published in 1795 (with a dedication to President Washington) and, according to its author, subscribed to by the President, the Vice-President and all members of Congress. von Martens, as translated by Cobbett, wrote:

> "A custom, generally acknowledged, extends the authority of the possessor of the coast to a cannon shot from the shore; that is to say, three leagues from the shore, and this distance is the least, that a nation ought now to claim, as the extent of its dominion on the seas." [83]

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[81] See the references by Riesenfeld, *op.cit.supra* note 62, at 29.

[82] See "Advertisement" by Cobbett in the English ed. of 1802.

[83] American ed. of 1795, at 160.

In the second French edition of 1801 the author clarified his position by stating:

> "Today all nations of Europe agree that, as a rule, the straits, gulfs and the adjacent sea belong to them at least up to the range of the cannon which could be placed upon the shore. In a number of treaties even the more extended principle of three leagues has been adopted." [84]

His reference to the treaties apparently was influenced by the three-leagues stipulations in the treaties of 1763 and 1783.

As the works of von Martens went through several editions during the first part of the nineteenth century, it is obvious that a maritime boundary of three *leagues* thus had the apparent support of one of the most authoritative writers of the times.

4.

The Jeffersonian Position and the Development during the Beginning of the Nineteenth Century

(35) The foregoing survey of treaty law, state practice and legal literature prior to 1793 shows that there is no shred of evidence that any particular rule or measure determining the breadth of territorial waters had grown into a custom accepted as law. All that can be supported by evidence is that excessive claims to *maria clausa* were no longer tolerated and that otherwise the type of interest in-

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[84] von Martens, Précis du droit des Gens Moderne de l'Europe, 71 (2d ed. 1801) [my translation].

volved, the geographical location and condition of the coast, the power of the state to fulfill obligations attendant on its assertions and, in general, the reasonableness of its position were governing.

In the period immediately following, two important factors come into play and need careful evaluation:

(a) the determination of the United States to claim and, tentatively and initially, be satisfied with, a territorial belt of three nautical miles;

(b) the determination of Great Britain, following and resulting from her naval victory of Trafalgar, to pursue a policy of insistence on the three-mile principle.

(36) The United States was confronted with the question of the breadth of her territorial belt for the first time when need for such determination arose for neutrality purposes in connection with the naval war between France and Great Britain.

On October 16, 1793 President Washington wrote to Governor Lee in connection with the capture of a British vessel:

> "Three miles, will, if I recollect rightly bring the Coningham within the rule of some decisions; but the *extent* of Territorial jurisdiction at Sea, has not yet been fixed, on account of some difficulties which occur in not being able to ascertain with precision what the general practice of Nations in this case has been." [85]

[85] 33 Writings of Washington, 131 (ed. by J. C. Fitzpatrick 1931-40).

But subsequent to that date, as a result of French pressures, cabinet meetings on the matter were held and a temporary determination made.[85a] The contents thereof were communicated to the belligerents in a circular letter of November 8 by Secretary of State Jefferson. The note to Mr. Genet, the French Minister, stated:

> "It is certain that, heretofore, they [governments and jurisconsults] have been much divided in opinion as to the distance from their sea coasts, to which they might reasonably claim a right of prohibiting the commitment of hostilities. The greatest distance, to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by an nation whatever, is the utmost range of a cannon ball, usually stated at one sea-league. Some intermediate distances have also been insisted on, and that of three sea-leagues has some authority in its favour. The character of our coasts, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation, as any nation whatever. Not proposing, however, at this time, and without a respectful and friendly communication with the Powers interested in this navigation, to fix on the distance to which we may ultimately insist on the right of protection, the President gives in-

[85a] For a summary of the Cabinet Decisions in question, signed by Jefferson, Knox, Randolph and Hamilton, see 4 Works of Hamilton, 480 (ed. by John C. Hamilton 1851), and 6 Writings of Thomas Jefferson, 452 (ed. by P. L. Ford 1895).

structions to the officers, acting under this authority, to consider those heretofore given them as restrained for the present to the distance of one sea-league, or three geographical miles from the sea-shore. This distance can admit of no opposition as it is recognized by treaties between some of the Powers with whom we are connected in commerce and navigation, and is as little or less than is claimed by any of them on their own coasts.

"Future occasions will be taken to enter into explanations with them, as to the ulterior extent to which we may reasonably carry our jurisdiction. For that of the rivers and bays of the United States, the laws of several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States." [86]

Similar passages were inserted in the communication to the British Minister, with the significant additional explanation:

"The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us in reason to as broad a margin of protected navigation as any nation whatever." [87]

(37) There can be no question that the position assumed by the United States was only taken as a temporary measure and was a minimum claim, especially in view of the fact that at that time the

[86] 6 Writings of Thomas Jefferson, 440 (ed. by P. L. Ford 1895).

[87] 6 Writings of Thomas Jefferson, 441 (ed. by P. L. Ford 1895).

United States lacked sufficient naval power to enforce observance of a larger neutrality zone, as it would have been obliged to do in such case.[88] The letters demonstrate that the United States took pains not to prejudice any subsequent enlargement of its territorial belt and specifically conceded "that... three sea leagues has some authority in its favor."

It is perhaps interesting to trace the content of this vew to a statement published by Hamilton three months earlier.[89] Hamilton stated with respect to the range of national jurisdiction over the adjacent sea:

> "What this distance is remains a matter of some uncertainty, though it is an agreed principle that it at least extends to the utmost range of cannon shot, that is, not less than four miles. But most nations claim and exercise jurisdiction to a greater extent. Three leagues, or nine miles, seem to accord with the most approved rule, and would appear from Martin, a French author, to be that adopted by France, though Valin, another French author, states it at only two leagues, or six miles."

Obviously the reference to "Martin, a French author" refers to the German authority von Martens, whose above-discussed French Précis du droit des gens had been published only a few years before and acquired great esteem.

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[88] See with respect to this duty the statement by Hamilton in his "No Jacobin" articles, reprinted in 5 Works of Alexander Hamilton, 18 at 28 (ed. by Henry Cabot Lodge 1904).

[89] "No Jacobin", reprinted in 5 Works of Alexander Hamilton, 18, at 28 (ed. by Henry Cabot Lodge 1904).

(38) Actually the United States took active steps toward an extension of her territorial waters as a result of the controversy with Great Britain over the impressment of seamen. In 1806 the United States and Great Britain entered into negotiations for a Treaty of Amity, Commerce and Navigation, which was signed on December 31, 1806, but not ratified. [90] The American commissioners pursuant to instructions "suggested that a fair distance would be as far out 'as the well-defined path of the gulf stream,' " [91] an idea which had found favor inside the government at the latest the year before. [92] The commissioners justified this position on four grounds: [93]

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[90] For the text see Proceedings in the North Atlantic Coast Fisheries Arbitration, Sen.Doc.No. 870, 61st Cong., 3d Sess., Vol VI, Appendix to Counter Case of the United States, 18 (1912).

[91] Proceedings in the North Atlantic Coast Fisheries Arbitration, *op.cit.supra* note 90, Vol. VI, Counter Case of the United States, 71, and Vol. IV, Case of Great Britain, 9 (1912). For the text of the instructions by Secretary of State Madison to Commissioners Monroe and Pinkney, dated May 17, 1806, see 3 American State Papers, Foreign Relations, 119, 121 (1832).

[92] See the account of President Jefferson's statement to that effect during [then Senator] Adams' visit on November 30, 1805, 1 Memoirs of John Quincy Adams, 375 (ed. by Charles Francis Adams 1874).

[93] See the enumeration of the four grounds given by the American commissioners in the memorandum of November 17, 1806 written by [Sir John] Nicholl in reference to the demands. The memorandum is reproduced in 1 McNair, International Law Opinions 331 (1956). See also the letter from the British Commissioners to Lord Howick, Proceedings in the North Atlantic Coast Fisheries Arbitration, *op.cit.supra* note 90, Vol. V, Appendix to Case of Great Britain, 103 (1912).

(a) The extent of the territory;
(b) Its distance from other jurisdictions;
(c) The number of Headlands;
(d) The shelving nature of its coast.

The English resisted the demands after having been advised by the King's Advocate of the inconveniences which would flow from any "concession" to an extension. His memorandum stated:

"It may be proper therefore to suggest what may be the inconveniences to be apprehended from the concession, in order to estimate the extent of the reciprocal demand to be founded on it.

"1. The Inconvenience of extending any Rule beyond its Reason; which renders it indefinite and arbitrary. If the Right of territory is to extend to two Leagues, may not demand be set up to extend it to twenty or two hundred?

"2. The Inconvenience of the precedent by which other Nations will be induced to apply for similar concessions. The extension of Territory in favour of the United States may possibly not be attended with considerable practical effects. But if the Rule became general, it might very naturally affect the interests of this country in the exercise of its maritime rights, when applied to the coasts of Europe, by protecting the commerce of the Enemy to the extent in many instances of entirely defeating the Power of Capture.

"3. The undue advantage it would give to the enemy, not only extending their means of refuge, but by enabling them to capture British vessels, or British goods on board neutral and even American vessels, in situations where

British Cruizers cannot capture the property of the enemy, nor even their Cruizers which may be there preying upon the Commerce of his Majesty's subjects, for I do not understand that other Nations have granted this extension to the Jurisdiction of the United States, so that while to Great Britain the Jurisdiction is to extend to two Leagues, to other Nations the distance of Cannon Shot will continue to be the Rule." [93a]

As a result only a carefully hedged extension of the maritime jurisdiction of Great Britain and the United States was agreed upon in Article XII of the Treaty [94] which the United States found unable to accept. [95]

(39) The positions taken by Great Britain and the United States in these negotiations show clearly that as of 1806 the United States did not accept the three-mile principle as a universal and inflexible rule of international law, while conversely Great Britain, as a consequence of having emerged as the principal naval power upon the victory at Trafalgar, from then on found it to be in her national interest to proclaim and insist on the three-mile principle as the established rule of international law, suffering exceptions only upon historic title.

(40) The conclusion must be reached therefore, that at least at that period there still was neither international agreement on the three-mile principle, nor was it accepted as binding by the United States.

No evidence can be found that a change of condi-

[93a] 1 McNair, International Law Opinions, 331 (1956).

[94] For text see *op.cit.supra* note 90.

[95] See letter by Mr. Madison to Messrs. Monroe and Pinkney, May 20, 1807, 3 American State Papers, Foreign Relations, 166 ff (1832).

tions had occurred between 1806 and 1836 when Texas enacted her statute. True, the United States joined Great Britain in a protest against an attempt by Russia in 1821 to bar all commercial vessels, other than Russian, from approaching within one hundred Italian miles from the northern coasts of Russia and Alaska.[96] But while the United States held the establishment of such exclusionary zones to be unwarranted under international law, Secretary of State John Quincy Adams placed his démarché merely on the ground that the prohibition went "beyond the ordinary distance to which territorial jurisdiction extends"[96a] without asserting a specific rule for such distance. In the whole course of negotiations terminating in an agreement of 1824, the United States refrained carefully from urging any definite number of miles.[97]

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[96] For the text of the imperial edict and the rules established for the limits of navigation and order of communication, along the coast of Eastern Siberia, the Northwestern Coast of America, and the Aleutian, Kurile, and other Islands, see 4 American State Papers, Foreign Relations, 857 (1834).

[96a] Note of February 25, 1822, reproduced in Proceedings of the Bering Fur-Seal Arbitration (Sen.Ex.Doc. 177, Part 2, 53d Cong., 2d Sess.) Appendix 132 ff., and 4 American State Papers, Foreign Relations, 861 (1834).

[97] For the contents of the diplomatic correspondence see Fur-Seal Arbitration, *op.cit.supra* note 96a, at 132-152; 4 American State Papers, Foreign Relations, 861-864 (1834); 5 American State Papers, Foreign Relations, 432-471 (1858).

PART III

Validity of the Texas Boundary Vis-à-vis the United States Resulting from Implied Acceptance

(41) Moreover, in the case of Texas the establishment of her boundary by the statute of 1836 is internationally valid and effective vis-à-vis the United States by reason of the conduct of the United States subsequent to the passage of said act. International law, like civil law in general, will neither condone, or give effect to, inconsistent actions by a state nor permit the disregard of acquired rights. The first principle is known as the prohibition against "*venire contra factum proprium*" (a doctrine similar to the common law doctrine of estoppel); the other principle is familiar as the protection of "*droits acquis*". Both rules are well established; as precedent for the first one the Eastern Greenland case,[88] the Minquires and Ecrehos case [88a] and Article 38c of the Statute of the International Court of Justice may be cited, while the second one inspired the reservation in favor of the legitimate interest of other states in the United States declaration of September 26, 1945, regarding the policy with respect to coastal fisheries in certain areas of the high seas.[89]

(42) During the whole period of the existence of the Republic of Texas the United States not only never protested against the sea boundary of Texas

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[88] P.C.I.J.Rep. Ser. A/B No. 53 (1933).
[88a] I. C. J. Reports, 1953, page 46.
[89] 59 Stat. 885 (1945).

established in the statute of 1836, but actively protected such boundary in the negotiations between the United States and Mexico terminating ultimately in the Treaty of Guadalupe-Hidalgo. [100] The Treaty of Guadalupe-Hidalgo stipulates in Article V,

> ". . . The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence . . ."

This draftsmanship was chosen for the particular reason to preserve the boundary established by Texas during her independence. This is amply borne out by the history of the Article in question.

In 1845 Secretary of State Buchanan furnished Mr. Slidell instructions regarding a possible settlement of the Mexican-United States dispute and specified the position of the United States. [101] He referred specifically to the boundary of Texas, which was then still an independent republic, and stated:

> ". . . Should the Mexican authorities prove unwilling to extend our boundary beyond the Del Norte, you are, in that event, instructed to offer to assume the payment of all just claims of citizens of the United States against Mexico, should she agree *that the line shall be established along the boundary defined by the act of Congress of*

[100] The pertinent documents are contained in Senate, Executive Doc. No. 52, 30th Congress, 1st Session, 1848.

[101] *Op.cit.supra* note 100, at 71 ff.

Texas, approved December 19, 1836, to wit: beginning at 'the mouth of the Rio Grande; thence up the principal stream . . .' "

In 1847 when the negotiations had entered into an active stage, Mr. Buchanan instructed Mr. Trist, the Commissioner for the United States, with regard to his position and attached a proposed project for the treaty, [102] which provided in Article IV,

". . . The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from the land opposite the mouth of the Rio Grande . . ."

The government of Mexico in a counter-proposal for a treaty [103] likewise took account of the former Texan maritime boundary and proposed in Article IV,

". . . La línea divisoria entre las dos repúblicas comenzara en el golfo de México tres leguas fuerá de tierra, enfrente de la embocadura austral de la bahia de Corpus Christi; . . ."

It can be seen from this statement that while Mexico wanted to shift the Mexican-United States boundary towards the east, it acknowledged three leagues as the proper extent of the maritime boundary.

(43) It is also of interest that during the debate on the treaty in the Senate, one of the senators, while

[102] *Op.cit.supra* note 100, at 85.

[103] *Op.cit.supra* note 100, at 375 (for Spanish text), and at 201 (for English text).

favoring another starting point of the Mexican-United States boundary, again relied on the three-leagues extent of the marine boundary. Mr. Davis of Mississippi proposed the insertion of the following Article. [104]

> ". . . The boundry line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite a point midway between the mouths of the river San Fernando and Santander . . ."

Again it can be seen that in the body, charged with advice and consent to the ratification of United States treaties, nobody at that time questioned the three-leagues provision with respect to the Gulf of Mexico, although with respect to the maritime boundary in the Pacific, the one-marine-league limit was recognized by terminating the bounday [105]

> " . . . 1 marine league due south of the southern-most point of port of San Diego."

(44) The foregoing negotiations, instructions and treaty stipulations show clearly that the United States at that time did not feel that the three-leagues boundary of Texas was internationally invalid and, on the contrary, tried to protect the same in her negotiations with Mexico. While it is true that upon protest on the part of Great Britain the government replied that the effect of the treaty was strictly *inter*

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[104] *Op.cit.supra* note 100, at 18.
[105] Treaty of Guadalupe-Hidalgo, Article V.

partes, certainly it cannot be denied that the United States for herself accepted the international validity of the Texas boundary.

Conclusions

On the basis of the foregoing exposition the following conclusions may and must be reached.

(1) The international validity of the maritime boundary on the critical dates between 1811 and 1845 depends on the absence of an international custom accepted as law prohibiting such boundary line.

(2) On the critical dates between 1811 and 1845 there was no general consent among the maritime powers as to a limitation of territorial waters to one league; on the contrary there existed respectable authority, evidenced by diplomatic correspondence and statements by authoritative text writers, expressly sanctioning a three- leagues limit.

(3) With respect to the Texas boundary in particular, the United States impliedly recognized such boundary both by failure to protest and by making it the basis of negotiations with Mexico and therefore is not now at liberty to question the validity on grounds of international law.

EXHIBIT III

Memorandum on Joint Brief for Gulf States †

By C. John Colombos, Q.C., LL.D.*

1. I propose dealing in the present Memorandum with the main points of law and of fact arising out of the joint reply of the States bordering on the Gulf of Mexico, in so far as they are common to all five States.

2. The principal issue which arises for decision in the present action relates to the purport and construction to be given by this Court to the terms of the Submerged Lands Act of 1953 which granted to the States certain property rights with respect to lands beneath navigable waters and the natural resources within such lands and waters within the boundaries of the respective States in the Gulf of Mexico, as they

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† The following memorandum was received too late to be incorporated by reference in the body of the brief. It demonstrates that, even under the strict British view, the rights of the Gulf Coast States to the submerged lands within their historic boundaries three leagues from coast are not in conflict with any principle of international law.

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existed at the time each State "became a member of the Union, or as heretofore approved by the Congress", but "in no event extending more than three leagues into the Gulf of Mexico."

3. The material date for determining these boundaries is accordingly the time when each of the five States became a member of the Union, viz. between 1812 and 1868, and the contention of the States is that at that crucial date, their maritime boundaries extended into the Gulf of Mexico at least three leagues from their coasts. On the other hand, the contention of the United States is that such boundaries "have never had any validity under international law" (at p. 104 of the Government brief).

4. As is pointed out in my separate Memorandum for the State of Texas, there has never been any unanimity on the breadth of the territorial sea. It will be sufficient to add here to the authorities there quoted, the opinion expressed by one of the leading authorities on international law, Hall, writing in 1880, who states that "It may be doubted, in view of the very diverse opinions which have been held until lately as to the extent to which marginal seas may be appropriated, of the lateness of the time at which much more extensive claims have been fully abandoned, and of the absence of cases in which the breadth of territorial waters has come into international question, whether the three-mile limit has ever been unequivocally settled." *International Law* (1880) pp. 126-127.

5. But even on the assumption that the three-mile extent of territorial waters has now acquired the authority of a general rule of international law (which is disputed), that rule suffers exceptions based on historic or prescriptive rights, or the special peculiarities of a coast. (See the Judgment of the International Court of Justice in: *The Fisheries Case*, I.C.J., Reports, 1951, 116).

6. This is particularly the case with the legal regime applicable to bays — such as the Gulf of Mexico — where quite different considerations arise from the ordinary rules generally governing the breadth of territorial waters in the open sea. The United States has itself accepted this three-league limit of territorial boundaries in the Gulf of Mexico in its various treaties with Mexico, and notably in the treaties of Guadalupe-Hidalgo of 1848 and of Gadsden of 1853, which fixed the boundary line at "nine nautical miles from land outside the mouth of the Rio Grande," and which was repeated in several subsequent treaties concluded by Mexico in the second half of the nineteenth century.

7. It is thus clear that a special rule of maritime boundaries has been recognised in the Gulf of Mexico based both on historic grounds covering a period of over a century, and the particular characteristics of its coasts.

8. Applied to the Gulf of Mexico, these characteristics relate to special and exceptional factors which justified the reasonableness of a greater breadth than in either the Atlantic or Pacific coasts of the

United States at the material date. Briefly stated these factors mainly concerned (a) the shallowness of the water along the Gulf coast, which rendered necessary an extended limit of maritime boundaries both for purposes of defence, and the suppression of smuggling; (b) the limited use of these waters by international traffic; (c) the absence of large stocks of fish as compared to the eastern and western coast of the United States; and (d) the custom prevalent, at the material dates, of expressing maritime boundaries in leagues rather than miles.

9. Considered, therefore, in the light of these factors the fixing of a three-league seaward boundary in the Gulf of Mexico appears reasonable in the circumstances existing at the relevant dates between 1812 and 1868.

Custom as a Source of International Law.

11. The question of the ascertainment of prescriptive or historic rights is closely bound with the rules of customary international law, which constitutes an important source of that law. As Chief Justice Marshall said in *United States v. Percheman:* "the usage of nations becomes law and that which is an established rule of practice is a rule of law." 7 Peters 51 (1833). The British House of Lords has similarly affirmed the importance of the general acceptance by civilised nations as a rule of international conduct, or practice. *Compania Naviera Vascongado v. Cristina* (1938) Appeal Cases at p. 497.

12. The same principle is reflected in Article 38 of the Statute of the International Court of Justice which describes custom as evidence of "a general practice, established as law".

13. The existence of this customary rule of international law may be established by its general recognition by the majority of States, without it being necessary to prove in every instance, that all States have invariably accepted the rule as obligatory. Brierly, *The Law of Nations*, 5th Edition, (1955), p. 62. It should be observed in this connection that special authority attaches to the usages of particular States in certain departments; so that no new maritime usage could well be regarded as generally binding, independently of agreement, unless it has been followed by the chief maritime Powers. Pitt Cobbett, *Cases on International Law*, 6th Edition (1947), vol. I. *Peace*, p. 9.

14. This Court in its leading judgment of *The Paquete Habana*, 175 U.S. 677 (1899), vindicated the doctrine of "the customs and usages of civilized Nations" as being an important part of international law.

15. The same consideration underlies the reference by the International Court of Justice in the *Fisheries Case* to "certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage," and, again, to "rights founded on the vital needs of the population and attested by very ancient and peace-

ful usage" *I.C.J. Reports*, (1951), at pp. 133 and 142.

16. This is particularly the case when the rules applicable to Bays come into consideration. The International Law Association whilst generally favouring the three-mile limit of territorial waters, approved at its *Vienna Conference* in 1926, the principle that in the case of bays "territorial waters shall follow the sinuosities of the Coast unless an occupation or established usage generally recognized by Nations has sanctioned a greater limit." Article 7 of the Draft Convention on the "*Laws of Maritime Jurisdiction in time of peace*", 34th Report, p. 102. Similarly, the Institute of International Law agreed at its *Stockholm Conference* in 1928 that for bays the territorial sea "is measured from a straight line drawn across the place nearest the opening of the sea where the distance between the two sides does not exceed ten nautical miles, unless an international usage has sanctioned a greater length." *Annuaire*, vol. 34, pp. 755-756.

17. In my opinion, therefore, both on account of the special characteristics of the Gulf of Mexico and on the ground of prescriptive and historic rights, the defendant States' claims to a three-league maritime boundary is valid and enforceable.

18. It should be added that, irrespective of the States' titles to this boundary, as above outlined, the United States' right to explore and exploit the natural resources of the continental shelf adjacent to its coasts, both under the *President's Proclamation*

of February 28, 1945, and the *Convention on "The Continental Shelf"*, adopted by the *Conference on "The Law of the Sea"* at Geneva, in April 1958, is complete and exclusive, and does not, in any way, depend on the maritime boundaries of the States in the Gulf of Mexico. Throughout its terms the transfer of property rights granted to the States by the Submerged Lands Act of 1953 are based "within the State boundaries" and not on the location of the United States "national maritime boundary." The United States, had, in fact, recognised and acquiesced in the States' maritime boundaries at the time they joined the Union. These boundaries were known to the United States Department of State and to the Congress at that crucial time, and yet during a period covering over a century, the United States Government never protested or raised any objection to the States' historic boundaries.

19. This course of conduct on the part of the Government raises the question of the doctrine of estoppel which, in my opinion, is applicable to the issues in dispute in the present action.

The Doctrine of Estoppel.

20. A further ground on which the claim of the States may be based is the doctrine of estoppel, which is valid both under municipal, inter-state and international law.

21. In the case of *Canada and Dominion Sugar Co. v. Canadian National (West Indies) Steamships*, (1947) A. C. 46, the Judicial Committee of the

British Privy Council, held that "the whole concept of estoppel is more correctly viewed as a substantive rule of law," and quoted with approval Sir Frederic Pollock's description of the doctrine of estoppel as "a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of Court jurisprudence" *(ibid,* at pp. 55-56). As Judge Lauterpacht stated in his book on *Private Law Sources & Analogies of International Law*, "the principle underlying estoppel is recognized by all systems of private law, not only with regard to estoppel by record, but also, under different names, with regard to estoppel by conduct and by deed" (at p. 204).

22. The growing reference which is frequently made to the doctrine of estoppel, both by municipal and international tribunals, shows the importance of the doctrine, and its close relation to the precepts of good faith, and to the maxim *"allegans contrarium non est audiendus."*

23. The International Court of Justice has also recognised, on several occasions, the operation of the principle of estoppel. Although it referred to it as a principle known in "Anglo-Saxon" law, it considered it as being also a "general principle of law". Thus the Court applied this doctrine in *The Eastern Greenland Case*, where it pointed out that the recognition by Norway of the whole of Greenland as Danish "debarred her from contesting Danish sovereignty over this territory" (Series A/B, No. 53 (1933) at p. 69).

24. In the course of the advisory proceedings before the Court concerning the *Interpretation of the Peace Treaties with Bulgaria, Hungary & Roumania*, the Governments of both the United States and Great Britain filed written Statements incorporating arguments based on estoppel (I.C.J. *Pleadings*, pp. 190-191).

25. In the *Nottebohm Case* before the same Court, the Liechtenstein Memorial pointed out that the doctrine of estoppel is similar in both international and municipal law and is essentially grounded on considerations of good faith and honest conduct in the relations of States and individuals alike" (I.C.J. *Pleadings*, vol. 1, p. 42). The action of Liechtenstein failed because it could not produce adequate evidence, but the Court impliedly admitted the validity of the doctrine of estoppel in its statement that Guatemala had not recognized Liechtenstein's title to exercise protection in favour of *Nottenbohm* and was not thus "precluded from denying such a title" (I.C.J *Reports*, (1955) p. 19).

26. The most important forms of the doctrine in so far as relevant to the present case, may be summarised under the three following headings:

(1) *Estoppel based on previous recognition.*

27. It could in my opinion, be argued on behalf of the States that the Government had, either expressly or by implication, recognised the States' claim to their "historic" boundaries. This contention may be illustrated by the United States pleadings in

the *Shufeldt Case*, which were based on the argument that Guatemala, having for six years recognised the validity of the claimant's contract and having allowed Schufeldt to continue to spend money on the concession, was precluded from denying its validity. The Arbitrator held in his award, that this argument was "sound" (1930) Report in vol. 2, U.N.R. A.A., p. 1079 at p. 1094.

(2) *Estoppel based on conduct.*

28. The doctrine of estoppel operates in this case by preventing a party from taking up a position in relation to a legal claim which is clearly inconsistent with its previous conduct in the matter. The question was carefully considered by the Law Officer of the British Crown in relation to the legality of the proposed annexation of territory by the Transvaal Republic, and he arrived at the conclusion that by reason of the recognition of the Boer settlement beyond the river Vaal, "Her Majesty's Government was precluded from disputing any title which the Republic might have acquired to the north of the river" (*Report of the Queen's Advocate to Lord Stanley*, Secretary of State for Foreign Affairs, dated 29th October, 1868, Foreign Office Records: *Africa (South)*.). Similarly, when in 1902 the British Foreign Secretary referred to the Law Officers of the Crown the question whether Persia could plead ignorance of the effect of an Egyptian Firman of 1873, their conclusion was that it would have been open to Persia to make a declaration relieving herself from her tariff obligations towards Egypt when

the Firman was first brought to her notice, but that "it is not competent to her to revert to an attitude of protest after having entered into negotiations with Egypt which were inconsistent with her plea of ignorance" (*Report* dated 17th November, 1902, *F.O. Records: Egypt.*)

29. A similar conclusion was reached in 1874 with regard to the Spanish claims to sovereignty over the Sulu Archipelago. The Report of the Law Officers of the Crown states that "whilst on the one hand it is quite true that Her Majesty's Government has never expressly recognised the validity of the claims of Spain, it is, on the other hand, equally true that Her Majesty's Government, with a full knowledge of all the facts, has stood by and allowed the claims to be acted upon, and, in our opinion, H. M.'s Government would not now be justified in further remonstrating against such claims" (*Foreign Office Records, 1874—Spain*).

30. A further instance of this principle is found in the dispute between the United States and Great Britain regarding the *Title to Islands in Passamaquoddy Bay*. The concluding passage of the British Case points out that, in view of the silence of the United States with regard to the Island of Grand Mana for some 23 years, "it may admit of some doubt whether this profound silence ought not now to preclude all further claim to it on their part", and this doubt was strengthened by the principle laid down by the Agent for the United States in his argument before the Commissioners under Article IV of the *Treaty of Ghent* in which he contended that,

"had the State of Massachusetts remained silent spectators of the improvements made upon the British Settlement on territory claimed by the United States, that would have indicated that the State of Massachusetts had no claim to the territory" (quoted in *Moore's International Adjudications* (Modern Series), vol. 6, p. 195.)

(3) *Estoppel based on acquiescence.*

31. This form of estoppel is founded on conduct coupled with a knowledge of legal rights or facts. It has been applied where a person, knowing his own title to a specified property, has suffered another to expend money on the property on the supposition that it was his own: (*Ramsden v. Dyson* (1886) L.R. 1, House of Lords, 129 at p. 140). It has rightly, in my view, been argued that "like recognition, acquiescence produces an estoppel and like extinctive prescription, acquiescence provides an alternative to recognition and, likewise, creates an estoppel" (Schwarzenberger, *The Fundamental Principles of International Law*, in *Hague Recueil*, vol 87 (1955), pp. 195 at pp. 256 & 259).

32. In the *Island of Palmas* arbitration, the arbitrator relied on the doctrine of estoppel in holding that "the acquiescence of Spain in the situation created after the establishment of the Dutch position in Sangi would deprive her and her successors of the possibility of still invoking conventional rights at the present time" (*Reports of the Permanent Court*

of Arbitration, at *The Hague*, *Award*, No. 18 of 1929.)

33. A similar argument was invoked in 1884 in a letter from Earl Granville, the then British Foreign Secretary, to Musurus Pacha, Turkish Ambassador to the Court of St. James, with reference to the rights of a British Shipping Company to operate her vessels on the Tigris and Euphrates rivers. As Earl Granville said: "the Company had enjoyed that privilege ever since 1861 with the knowledge and acquiescence of the Porte, the absence of protest during that period showing that the attitude of the Porte had been one of acquiescence in a claim of right on the faith of which the Company had made large capital investments. Her Majesty's Government, therefore, consider that the attitude of the Porte during the last twenty-two years debars them from now disputing the validity of the rights claimed and exercised by the Company under the Vizirial letter of 1861, and that they are entitled to insist on the *status quo* of the Company being maintained" (*Foreign Office Records*, May 28, 1884, *Turkey*).

34. A still further instance of this rule is traced in correspondence exchanged in 1899 between the United States and Great Britain regarding the boundary between Venezuela and British Guiana. The United States Secretary of State in dismissing the British claims to the boundary, concluded with the following passage: "If Great Britain's assertion of jurisdiction, on the faith of which her subjects made settlements on territory subsequently as-

certained to be Venezuelan, could be shown to have been in any way assented to or acquiesced in by Venezuela, the latter Power might be held to be concluded and to be estopped from setting up any title to such settlements" (Printed in the *British Command Paper* No. 9501 (1899) *Venezuelan Argument*, p. 63).

35. As applied to the case of the States in the present action, the above authorities clearly prove that by reason of the recognition, acquiescence, and conduct of the United States for a period extending over a century, the Government is estopped from denying the rights of the States to their historic boundaries.

Further in my opinion, the Government's contention that a maritime boundary exceeding three miles in extent is contrary to the United States "national foreign policy", or to the rules of international law, cannot be supported.

36. The relevant question which falls to be decided in the present action relates to the interpretation to be given by this Court to the Submerged Lands Act, a matter of domestic concern, substantially governed by the provisions of the United States Constitution. The question of the apportionment of the national maritime boundaries, as between the Federal Government and the State is no concern of international law. Indeed, if it were to be contended that the right of the States to a three-league maritime boundary when claimed by the States, is con-

trary to the rules of international law, it would be equally so when claimed by the Federal Government.

37. It would be easy to imagine the dire consequences which would flow from such a contention. They would imply that the President's Proclamation of the 28th September, 1945, claiming jurisdiction and control over "the natural resources of the subsoil and sea-bed of the continental shelf" is contrary to the principles of international law. They would also stultify the American claims to the continental shelf as upheld by the American delegates both before the International Law Commission of the United Nations and the Geneva Conference on "The Law of the Sea" of February-April 1958.

38. It is sufficient to pause here for a minute in order to realise that the Government's arguments on this point are wholly untenable. Moreover, they are inconsistent with the Government's express admissions. Thus at p. 250 of its Brief, the Government states that "since the United States claims, as against other nations, the right to control exploitation of the continental shelf, it could delegate to the States any portion of such control without regard to the location of the State boundaries." Again at p. 148 of its Brief, the Government admits that "it is perfectly true that the United States claims control over the resources of the seabed beyond its maritime boundary, so far as the edge of the continental shelf, and that whether such control is to be exercised by the National Government or by the States, is a matter

of domestic distribution of powers, which does not concern other nations."

39. Considered in their obvious implications, these admissions make it impossible for the Government to claim for itself rights which it denies to the States on the ground that they are contrary to the "national foreign policy," or to the rules of international law.

Conclusion

40. In my opinion, it clearly results from the consideration of all relevant points of law and of fact applicable to the present issue, that the five States bordering on the Gulf of Mexico have established their right of ownership, control and jurisdiction of the natural resources underlying that portion of the Gulf of Mexico within their historic boundaries, three leagues from shore, and that such right does not offend any principle of the United States "national foreign policy" or any principle of international law.

41. I am further of the opinion that no conflict results under either of these principles in giving full effect to the Submerged Lands Act of 1953 which granted to the States title to and ownership of the lands beneath navigable waters within their historic boundaries, together with the right and power to manage, administer, lease, develop and use the said lands and natural resources.

C. John Colombos

Temple:
31st July, 1958.